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IN THE

Supreme Court of the United States

MIKE HATCH, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF MINNESOTA
AND NOT AS AN INDIVIDUAL,

Petitioner,

v.

CELLCO PARTNERSHIP
D/B/A VERIZON WIRELESS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In May 2004, the Minnesota Legislature enacted the "Consumer Protections for Wireless Customers" law in direct response to complaints by Minnesota consumers that wireless telecommunications service companies were unilaterally changing contract terms without notice or customer consent. 2004 Minn. Laws ch. 261, art. 5 (codified at Minn. Stat. § 325F.695 (2004)). The Minnesota law requires wireless service providers to disclose contract terms and to obtain customer consent to certain types of contract changes. The questions presented are:

1. Whether Minnesota's law requiring wireless service providers to provide notice and obtain customer consent before they change the terms of an existing contract is preempted by 47 U.S.C. § 332(c)(3)(A).

2. If the Court determines that any portion of Minn. Stat. § 325F.695 (2004) has been preempted by 47 U.S.C. § 332, whether the remaining portions of the statute are severable and enforceable.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Mike Hatch, in his official capacity as Attorney General of Minnesota, was the defendant-appellee in the court of appeals.

Respondents Cellco Partnership d/b/a Verizon Wireless, Verizon Wireless (VAW) LLC d/b/a Verizon Wireless, Duluth MSA Limited Partnership d/b/a Verizon Wireless, Midwest Wireless Holdings L.L.C., Midwest Wireless Communications L.L.C., American Cellular Corporation, Rural Cellular Corporation d/b/a Cellular 2000, Sprint Spectrum L.P., WirelessCo, L.P., AT&T Wireless Services of Minnesota, Inc., VoiceStream Minneapolis, Inc., and T-Mobile USA, Inc. were plaintiffs-appellants in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Mike Hatch, in his official capacity as Attorney General of Minnesota, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App., *infra*, 1a-15a) is reported at 431 F.3d 1077 (8th Cir. 2005). The order of the district court on plaintiffs' motion for a preliminary injunction and dissolving its temporary restraining order (Pet. App., *infra*, 16a-32a) is not reported but is available at 2004 WL 2065807 (D. Minn. Sept. 3, 2004). The temporary restraining order of the district court (Pet. App., *infra*, 33a-44a) is not reported but is available at 2004 WL 1447914 (D. Minn. June 29, 2004).

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of 47 U.S.C. § 153, 47 U.S.C. § 332, and Minnesota Statutes § 325F.695 and

§ 645.20 are set forth in the Appendix at Pet. App., *infra*, 45a-49a.

STATEMENT OF THE CASE

I. Background

By December 2004, *184.7 million American customers*, or more than sixty percent of the population of the United States, subscribed to wireless telephone service. *See In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Tenth Report, WT Docket No. 05-71, 2005 WL 2429714 (F.C.C.), at *2 (rel. Sept. 30, 2005). And just as prolific as the number of wireless customers is the number of complaints generated by wireless phone use. In 2002, the Better Business Bureau ("BBB") received more complaints about the cellular (or wireless) industry than any other industry in the country. C.A. App. 0436.[1] In 2003, the number of complaints lodged with the BBB against the wireless industry was second only to the number against automobile dealers. *Id.* In 2004, the wireless industry once again ranked as the most-complained about industry in the country. *See* The Council of Better Business Bureaus, 2004 Summary at iv (United States BBBS Top Ten Complaints), http://www.bbb.org/about/stat2004/04summary.pdf (last visited March 6, 2006).

In 2004, the Minnesota Legislature enacted the "Consumer Protections for Wireless Customers" statute

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[1] Citations to "C.A. App." are to the Joint Appendix filed with the court of appeals.

(the "Act") to protect Minnesota wireless consumers from serious problems involving wireless providers' abuse of customers' service contracts. *See* Minn. Stat. § 325F.695 (2004) (codifying 2004 Minn. Laws ch. 261, art. 5). The Act includes three basic consumer protection provisions. First, wireless providers are required to give customers a copy of their contract. Minn. Stat. § 325F.695, subd. 2 (2004). Second, wireless providers are required to give notice of and obtain a customer's affirmative consent to any substantive change in the contract proposed by the provider.[2] *Id.*, subd. 3. Third, when a customer proposes a change in the contract, the provider is required to disclose any rate increase or contract extension that could result from the customer's proposed change and to maintain a record of the disclosures. *Id.*, subd. 4.

In adopting the Act, the Minnesota Legislature was clear that the statute was intended to protect consumers from wireless providers' unfair business practice of unilaterally changing substantive terms of service contracts, and to ensure meaningful customer assent to contract terms and changes. The Legislature wanted to address concerns like those expressed by John Povejsil, who testified at a legislative hearing that his wireless provider had converted his month-to-month contract into a one-year contract without his knowledge or consent. C.A. ~~App.~~ 0333. Povejsil became aware of this unilateral contract change only after he called to cancel his contract, and the company imposed an

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[2] A "substantive change" is defined in relevant part as a change in "a term or condition in a contract that could result in an increase in the charge to the customer under that contract *or* that could result in an extension of the term of that contract." Minn. Stat. § 325F.695, subd. 1(d) (2004) (emphasis added).

"early termination fee" of $150, claiming that he was terminating the contract before the end of the new, and unilaterally imposed, one-year term. *Id.* at 0333, 0335. Povejsil paid the termination fee, explaining that it is not cost-effective for individual consumers to dispute the charge. *Id.* at 0336.

Similarly, the Minnesota Legislature considered consumer Melinda Peterson's testimony that her wireless provider extended her contract term without notice or her consent when she merely added nights and weekends to her calling plan. C.A. App. 0361. Not until she called to cancel her service was she told the wireless provider had unilaterally extended her contract. *Id.* The wireless provider then attempted to impose an early termination fee even though the end of her original contract term had long since passed. *Id.*

Minnesota regulators also received growing numbers of complaints from citizens about problems with their wireless providers. Complaints received by the Attorney General's Residential Utilities Division ("RUD") involved numerous wireless providers that engaged in remarkably similar conduct – extending the duration of wireless service contracts without customer knowledge or consent, imposing cancellation penalties of up to $200 per phone for "early termination" of the unilaterally extended contract, and threatening customers with collection agency action, thereby impacting their credit rating, if the customers did not pay the cancellation penalty. *See, e.g.*, C.A. App. 0304-09, 0316-24, 0413-15, 0418-26, 0440-43.

In 2002, the number of complaints received by the RUD against wireless providers exceeded the number of complaints made against all local and long distance

telephone companies and energy utilities *combined*. C.A. App. 0428. In 2003 and 2004, wireless complaints again outnumbered the number of complaints against all local telephone companies and energy utilities. *Id.*

II. Proceedings In This Case

A. The District Court Proceedings

On June 16, 2004, just two weeks before the Act was to become effective, the Respondents filed suit in the United States District Court for the District of Minnesota seeking declaratory judgment that the Act regulates rates charged by wireless providers and is preempted by 47 U.S.C. § 332(c)(3)(A).[3] The Respondents concurrently filed a motion for a temporary restraining order. The jurisdiction of the district court was invoked by the Respondents pursuant to 28 U.S.C. §§ 1331, 1337, 1343(3), and 2201.

Based on limited briefing and a limited factual record, the district court entered a temporary restraining order on June 29, 2004, enjoining implementation of the Act until the district court could further consider the Respondents' motion for a preliminary injunction. Pet. App., *infra*, 33a-44a. After supplemental briefing and the development of a more complete factual record (including the legislative history of the Act and affidavits from consumers who had been the target of unilateral contract changes), the district

[3] The Respondents also alleged that the Act is preempted by other provisions of federal telecommunications law. In addition, the Respondents alleged that the Act is unconstitutional in that it is void for vagueness and that it violates the Contracts Clause, the Due Process Clause, and the Commerce Clause. C.A. App. 0045-88.

court issued its Memorandum Opinion and Order on Plaintiffs' Motion for a Preliminary Injunction dissolving the temporary restraining order and denying a blanket injunction. Pet. App., *infra*, 16a-32a.

On September 10, 2004, the Respondents filed a Notice of Appeal.

B. The Eighth Circuit Court Of Appeals Proceedings

On December 9, 2005, the Eighth Circuit reversed the district court's denial of the Respondents' request for a blanket preliminary injunction and remanded the case to the district court for entry of a permanent injunction against enforcement of the Act. Pet. App., *infra*, at 1a-15a. The Eighth Circuit recognized that courts are to presume that "Congress does not intend preemption of historic police powers of the States 'unless that was [its] clear and manifest purpose.'" *Id.* at 5a (citation omitted). Nonetheless, the Eighth Circuit went on to hold that subdivision 3 of the Act is preempted by 47 U.S.C. § 332(c)(3)(A). Significantly, the Eighth Circuit reached this conclusion without finding it was Congress's "clear and manifest" purpose to preempt such a law. *Id.* at 1a-15a.

The Eighth Circuit held that 47 U.S.C. § 332(c)(3)(A) preempts state statutes which "fix[]" wireless service rates. *Id.* at 9a (citation omitted). The Eighth Circuit determined that the Act "fixes" rates simply by requiring notice and customer consent to mid-term rate increases because the law "prevents providers from raising rates for a period of time. . . ." *Id.* The Eighth Circuit also stated: "[s]ubdivision 3 . . . cannot be deemed a 'neutral application of state contractual or consumer fraud laws' that

avoids the preemptive force of the federal statute." *Id.* at 12a (citation omitted).

After determining that subdivision 3 of the Act was preempted by federal law, the Eighth Circuit struck down the remaining provisions of the Act. *Id.* at 12a-14a. The Eighth Circuit held that the remaining provisions of the Act are not severable, even though Minnesota law provides a strong presumption in favor of severability. *Id.*; Minn. Stat. § 645.20 (2004).

REASONS FOR GRANTING THE PETITION

This case presents the first time a court of appeals has examined whether a state statute specifically designed to protect consumers from the unfair business practices of wireless service providers is preempted by 47 U.S.C. § 332(c)(3)(A). This issue has immensely important, far-reaching implications for the sovereign rights of the fifty States and their 184 million wireless customers.

The Eighth Circuit's decision tramples upon the sovereign authority of the States. This Court has long recognized the historic police powers of the States to protect their citizens from unfair business practices. *See, e.g., Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 137-38, 146 (1963). In enacting 47 U.S.C. § 332(c)(3)(A), Congress expressly preserved the authority of the fifty States to regulate all terms and conditions of commercial wireless service other than "rates charged" and "entry." 47 U.S.C. § 332(c)(3)(A). The legislative history of 47 U.S.C. § 332(c)(3)(A) demonstrates that Congress intended this express reservation of state authority to include consumer

protection matters. *See* H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.

The decision below effectively strips the States of their police power to prohibit unfair business practices by wireless providers. The Eighth Circuit interpreted the meaning of "regulat[ion]" of "rates charged" in 47 U.S.C. § 332(c)(3)(A) so broadly that States are left to wonder whether any state consumer protection laws focusing on wireless contracts, no matter how far removed from the rates charged, will be able to survive a preemption challenge. The Eighth Circuit's decision also threatens the States' authority to ensure notice of, and meaningful consent to, wireless contract changes even through a law of general applicability. As a result of the Eighth Circuit's overly expansive interpretation of the scope of preempted state regulation of "rates charged," the scope of permissible state regulation of "other terms and conditions" of wireless service is uncertain despite Congress's express preservation of state authority in 47 U.S.C. § 332(c)(3)(A).

In addition, the Eighth Circuit's decision has far reaching implications for this country's 184 million wireless customers. In the absence of state consumer protections, those consumers will be left without any meaningful remedy if a wireless provider unilaterally changes a contract term without notice or consent.

It is this Court, not the Eighth Circuit, that should determine the critically important question of the scope of the States' rights to protect wireless consumers as preserved by Congress pursuant to 47 U.S.C. § 332(c)(3)(A). Determination of this issue will have profound consequences for the millions of wireless consumers in this country and the sovereign rights of the fifty States.

I. The Decision Below Addresses A Question Of Immense Importance To The States And To Millions Of Wireless Customers Regarding The Scope Of The States' Rights Preserved By 47 U.S.C. § 332(c)(3)(A)

A. The Decision Below Strips The States Of Their Sovereign Right To Protect Wireless Consumers

The Eighth Circuit's decision severely infringes on the States' sovereign right to exercise their police powers. States have long regulated consumer protection matters, including unfair business practices, pursuant to their police powers. *See, e.g., California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (recognizing States have traditionally regulated against monopolies and unfair business practices); *Fla. Lime & Avocado Growers*, 373 U.S. at 146 (recognizing state authority to "prevent the deception of consumers"). Further, "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation marks omitted; citations omitted). As Justice Brandeis so aptly stated, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New Skate Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This Court has also recognized that the States have a long history of regulating utilities. *Fed. Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464, 489 (1950) (Jackson, J., dissenting) ("Long before the Federal Government could be stirred to regulate utilities, courageous states

took the initiative and almost a whole body of utility practice has resulted from their experience.")

"[B]ecause the States are independent sovereigns in our federal system," this Court has "long presumed that Congress does not cavalierly pre-empt" state law. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). "In areas of traditional state regulation, [the Court] assume[s] that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" *See Bates v. Dow Agrosciences LLC.*, 125 S. Ct. 1788, 1801 (2005) (citations omitted). Where two alternative readings of a federal statute are plausible, this Court has said that it has "a duty to accept the reading that *disfavors* pre-emption." *See id.* (emphasis added).

In enacting 47 U.S.C. § 332(c)(3)(A), Congress expressly preserved States' authority over all terms and conditions of commercial wireless service, other than "rates charged" and "entry." The statute provides in pertinent part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that *this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.*[4]

Pet. App., *infra*, 45a (emphasis added). The legislative history of 47 U.S.C. § 332(c)(3)(A) evidences Congress's

[4] It is undisputed that the term "commercial mobile services" as used in 47 U.S.C. § 332(c)(3)(A) includes what are commonly known as commercial wireless service or cellular telephone service.

intent to preserve broad state authority to regulate wireless consumer protection matters:

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and *other consumer protection matters*; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. *This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."*

H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

The decision below flies in the face of Congress's clear and manifest intent to allow States to regulate wireless consumer protection matters. The Eighth Circuit's conclusion that the Act is preempted "rate regulation" erroneously and detrimentally deprives Minnesota and the other forty-nine States of their historic, sovereign authority to protect their citizens from unfair business practices.

The Eighth Circuit's decision goes so far as prohibiting the States from even requiring wireless telecommunications companies to provide advance notice of contract changes. The Eighth Circuit evidently believes that Congress intended that States not be allowed even to ensure that their residents are informed of the terms of their own contracts. According to the Eighth Circuit's reasoning, Congress apparently intended to allow wireless providers to engage in a type of "gotcha" commerce through which the companies can regularly change the

terms of their customers' contracts without their customers' knowledge.

This result is absurd and unprecedented. States commonly use their police powers to impose notice requirements and such requirements are common consumer protection provisions applicable to a variety of industries. *See, e.g.*, Minn. Stat. § 17.92 (2004) (requiring prior notice of intention to terminate certain agricultural contracts); Minn. Stat. § 82A.11 (2004) (requiring notice of the right to rescind a membership camping contract); Minn. Stat. § 306.25 (2004) (requiring cemetery associations to provide prior notice of intention to terminate a burial plot contract); Minn. Stat. § 325G.25 (2004) (requiring health, social referral and buying clubs to notify new members of their right to cancel their contracts); Minn. Stat. § 325G.50 (Supp. 2005) (requiring travel clubs to notify new members of their right to cancel); Minn. Stat. § 325N.03 (2004) (requiring foreclosure consultants to notify customers that the consultant cannot take certain actions and of the right to cancel); Minn. Stat. § 559.21 (2004 & Supp. 2005) (requiring notice to purchaser of real estate that the contract will terminate unless the purchaser complies with certain conditions).

Similarly, the Eighth Circuit's decision bars States from requiring wireless providers to obtain a customer's consent before changing the terms of their contracts.[5] Yet

[5] Wireless providers offer a number of different calling plans, but the customer is typically required to take service subject to a standard form contract. *See, e.g.*, C.A. App. 0129, 0148 (Declaration of Nancy Clark in Support of Verizon Wireless's Motion for a Temporary Restraining Order; Verizon Standard Customer Agreement). These non-negotiable form contracts generally allow the company – and *only* the company – to change the terms of the contract. For example, Verizon's

(Continued on following page)

this requirement is exactly the type of consumer protection provision that States have enacted in any number of areas. *See, e.g.*, Minn. Stat. § 27.03 (2004) (requiring the consent of both the buyer and the seller for a change to certain wholesale produce contracts); Minn. Stat. § 325F.245, subd. 3 (2004) (prohibiting the automatic renewal of consumer lawn care contracts); Minn. Stat. § 325G.26 (2004) (requiring customer consent to convert certain club contracts of eighteen months or less to longer than eighteen months); Ark. Code Ann. § 4-86-106 (Supp. 2005) (prohibiting automatic renewal of home security services contracts); Col. Rev. Stat. § 42-9-105 (2005) (requiring customer consent to auto repair charges exceeding an estimate by a designated amount). The Eighth Circuit's reasoning appears to suggest that even a state law of general applicability requiring affirmative customer consent to contract changes would be preempted as applied to wireless service contract changes. *See* Pet. App., *infra*, 9a-10a.

The decision below not only precludes the States from requiring affirmative customer consent to wireless contract changes (whether done through a wireless-specific law or a law of general applicability), but it also appears to bar the States from adopting other measures to protect wireless consumers from the unfair business dealings of

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contract includes a provision purporting to allow Verizon to make unilateral contract changes at any time. *Id.* at 0149. Potential customers wanting service under one of Verizon's calling plans have no choice but to agree to the non-negotiable standard contract containing such language. *See id.* at 0129, 0148-49. Many customers, however, probably do not even realize that they are subject to this provision because the language in the contract allowing unilateral changes does not appear until the second page and is printed in a small font. *See id.* at 0149.

wireless providers. For example, under the Eighth Circuit's reasoning, States could even be precluded from adopting an opt-out consent process for mid-term contract changes like that in existing wireless form contracts. Under the Eighth Circuit's reasoning, an opt-out approach to contract changes would also "prevent[] providers from raising rates for a period of time," namely the period of time the customer is given to opt-out, and thus "fix[] the rates." Pet. App., *infra*, 9a. The Eighth Circuit's reasoning appears to bar both a wireless-specific opt-out law and an opt-out law of general applicability.

The above are but a few examples of how the Eighth Circuit's decision directly interferes with the continued authority of the States to exercise their sovereign rights to adopt wireless consumer protection measures. Whether 47 U.S.C. § 332(c)(3)(A) limits the States' historic power to adopt consumer protection measures is a decision that needs to be made by this Court, not the Eighth Circuit.

B. The Decision Below Undermines States' Authority To Enact Laws Targeting Problems Unique To The Wireless Industry

The Eighth Circuit found that subdivision 3 of the Act "cannot be deemed a 'neutral application of state contractual or consumer fraud laws' that avoids the preemptive force of the federal statute." Pet. App., *infra*, 12a. This determination could be interpreted by courts to prohibit States from adopting wireless-specific consumer protection statutes. Such a result would have devastating and widespread consequences upon the States and their citizens.

Wireless-specific state statutes are a necessary consumer protection tool. These statutes allow States to

target the unique business practices arising in the wireless industry that may not be present in other industries. States have long exercised their police powers by enacting statutes designed to prevent an abuse unique to a specific industry. *See, e.g.*, Minn. Stat. § 325F.662 (2004) (governing the sale of used motor vehicles); Minn. Stat. § 325F.171 (Supp. 2005) (providing for crib safety); Minn. Stat. § 325F.665 (2004) (regulating new motor vehicle sales); Minn. Stat. § 504B.375, subd. 4 (2004) (prohibiting the waiver of certain rights in a residential lease). Some state laws expressly deal with consumer contract extensions. *See, e.g.*, Minn. Stat. § 325G.26 (2004) (requiring customer consent to convert certain club contracts of eighteen months or less to a period of longer than eighteen months); Minn. Stat. § 325F.245 (2004) (prohibiting automatic renewal of consumer lawn care contracts).

Further, consumer protection laws targeting a particular industry address problems for which traditional legal remedies, including claims brought under general contract or consumer protection laws, may be inadequate. Indeed, the Minnesota Legislature enacted the Act at issue here after learning that, as a practical matter, traditional legal remedies did not stop wireless providers from engaging in the unfair practice of unilaterally altering wireless contracts. *See* C.A. App. 0336; Minn. Stat. § 325F.695 (2004). The States will be extremely limited in their ability to stop problems specific to the wireless industry if they are precluded from adopting wireless-specific statutes. States will be compelled to pass legislation affecting all commercial endeavors in order to reach the offending wireless-industry practice. Few state legislatures will be inclined to enact broadly applicable laws just to discourage a specific practice limited to one industry.

The Eighth Circuit's decision also jeopardizes the validity of existing wireless-specific consumer protection statutes enacted by States throughout the country. At least thirteen, or fully one-quarter of all States, have already enacted wireless-specific laws.[6] Just last year, at least eleven new wireless-specific consumer protection statutes were enacted by eight different States.[7] The recent passage

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[6] The States include California, Georgia, Illinois, Louisiana, Maine, Minnesota, Nebraska, Nevada, Rhode Island, South Dakota, Tennessee, Texas, and Washington. *See* notes 7-8, *infra*.

[7] *See, e.g.*, Cal. Mil. & Vet. Code § 823 (West Supp. 2006) (authorizing active military personnel to cancel wireless service contracts without penalty); Ga. Code Ann. § 46-5-8 (Supp. 2005) (allowing termination of wireless service contracts by active service members); Ga. Code Ann. § 46-5-28 (Supp. 2005) (requiring the wireless customer's consent for inclusion in a wireless telephone database or a directory); 2005 Ill. Legis. Serv. P.A. 94-567 (West) (to be codified at 815 Ill. Comp. Stat. § 205/2VV) (requiring wireless providers to provide certain information regarding third party billings); 2005 Ill. Legis. Serv. P.A. 94-635 (West) (to be codified at 815 Ill. Comp. Stat. § 633/10) (allowing termination of wireless service contracts by active duty service members without penalty); La. Rev. Stat. Ann. § 29:314 (Supp. 2006) (allowing termination of cellular contracts by active duty service members without penalty under certain circumstances); La. Rev. Stat. Ann. § 29:418.1 (Supp. 2006) (allowing termination or suspension of cellular phone contracts by persons called to service in the military); Minn. Stat. § 325E.318 (Supp. 2005) (prohibiting wireless providers from including a customer's telephone number in a wireless telephone directory assistance database without the customer's prior authorization); S.D. Codified Laws § 49-31-118 (Supp. 2005) (prohibiting wireless providers from including a customer's telephone number in a wireless directory assistance service database or disseminating that information without the customer's prior authorization); Tex. Util. Code Ann. § 64.202 (Vernon Supp. 2005) (prohibiting wireless providers from publishing the name and telephone number of a wireless customer without the customer's express consent); Wash. Rev. Code Ann. § 19.250.010 (West Supp. 2006) (prohibiting wireless providers from including the telephone number of any customer in any directory without the customer's consent and prohibiting wireless providers from charging for opting not to be listed in a directory).

of so many wireless consumer protection statutes evidences the widespread, growing and serious nature of the problems faced by wireless customers. The wireless-specific laws cover a wide range of consumer matters.[8] For example, state wireless-specific laws:

1) allow military personnel in active duty to cancel wireless telephone service contracts without penalty;

2) prohibit wireless providers from including the telephone number of a wireless customer in a directory or telephone database without customer consent;

3) prohibit wireless providers from charging a customer for opting not to be listed in a directory;

4) ban automatic renewal of wireless contracts;

5) require disclosure of contract terms;

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[8] *See* note 7; *see also* Cal. Pub. Util. Code § 2885.6 (West 1994) (requiring cellular companies to provide service quality reports upon request of the California commission; enacted in 1993); La. Rev. Stat. Ann. § 45:844.5-8 (Supp. 2006) (requiring wireless providers to provide a written contract and prohibiting wireless providers from automatically renewing a contract; enacted in 1999); Me. Rev. Stat. Ann. tit. 35-A § 8902 (Supp. 2005) (authorizing the Maine commission to exercise jurisdiction over wireless providers for purposes of implementing telephone number conservation measures; enacted in 1999); Neb. Rev. Stat. § 86-125 (Supp. 2004) (requiring registration of wireless providers with the Nebraska commission; enacted in 2002); Nev. Rev. Stat. § 707.370 (2003) (requiring wireless companies to provide access to emergency telephone numbers at no charge; enacted in 1993); R.I. Gen. Laws § 39-2-1.3 (Supp. 2005) (limiting use of late fees imposed by wireless providers; enacted in 1998); Tenn. Code Ann. § 47-18-1901 (2001) (requiring contracts for wireless services to have a separate acknowledgment of any minimum service period; enacted in 1997).

6) require acknowledgment of any minimum contract term;

7) limit charges for late fees;

8) regulate third party billings on wireless bills;

9) require registration by wireless providers;

10) require service quality reporting at the request of the state commission; and

11) subject wireless providers to telephone number conservation measures.[9]

As the number of wireless customers continues to grow, the number of States enacting similar laws can be expected to grow as well.

Significantly, Respondents admitted in the course of this proceeding that the Louisiana, Rhode Island and Tennessee laws cited in Petitioner's Eighth Circuit Brief "do not regulate rates." *See* Reply Brief of the Joint Appellants, *Cellco Partnership d/b/a Verizon Wireless, et al. v. Hatch*, Eighth Cir. No. 04-3198, at 13, note 8 (December 20, 2004); *see also* Appellee's Brief and Addendum, *Cellco Partnership d/b/a Verizon Wireless, et al. v. Hatch*, Eighth Cir. 04-3198, at 44 (December 2, 2004) (citing La. Rev. Stat. Ann. § 45:844.5-844.8, R.I. Gen. Laws § 39-2-1.3, and Tenn. Code Ann. § 47-18-1901).[10] Thus, Respondents themselves acknowledged that state wireless-specific

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[9] *See* notes 7-8, *supra*.

[10] The other state wireless-specific laws listed above were not included in Petitioner's brief filed with the Eighth Circuit. In fact, many of those state laws were not enacted until *after* briefing before the Eighth Circuit was completed.

statutes banning the automatic renewal of wireless service contracts, requiring advance disclosure of contract terms, and restricting the imposition of late fees do not constitute improper rate regulation. Respondents conceded that such laws are not preempted by 47 U.S.C. § 332(c)(3)(A) because that section only precludes States from regulating "rates charged" and "entry."[11] Consequently, though even the industry admits that States may regulate these areas through wireless-specific statutes, the Eighth Circuit's decision suggests that state laws of "neutral" or general applicability are permissible, but not laws targeting the wireless industry even if those wireless-specific laws do not regulate rates. *See* Pet. App., *infra*, 11a-12a; 47 U.S.C. § 332(c)(3)(A).

The determination as to whether 47 U.S.C. § 332 precludes States from adopting wireless-specific consumer protection statutes is a matter of critical importance to the States and their ability to protect the growing number of wireless customers.[12] It is imperative that this Court resolve the uncertainty regarding whether Congress preserved the States' traditional police power authority to adopt wireless-specific consumer protection statutes when

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[11] The Respondents' admission that the Louisiana law banning automatic-renewal provisions in wireless contracts does not regulate rates reinforces the conclusion that requiring customer consent to an extension in the length of a wireless contract likewise does not regulate "rates charged," and therefore is not preempted by 47 U.S.C. § 332(c)(3)(A).

[12] According to the Federal Communications Commission ("FCC"), the number of wireless subscribers in the country grew from 160.6 million in 2003 to 184.7 million in 2004. *See In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Tenth Report, WT Docket No. 05-71, 2005 WL 2429714 (F.C.C.), at *2 (rel. Sept. 30, 2005).

it preserved the States' right to regulate "terms and conditions" of commercial wireless service.

C. The Decision Below Leaves More Than 184 Million Wireless Customers In This Country Unprotected From The Unfair Business Practices Of The Wireless Industry

Unfortunately for the millions of wireless customers in this country, the wireless providers will be allowed to continue the unfair practices of unilaterally changing contracts and imposing unconscionable change-in-terms provisions if the decision below is allowed to stand. Wireless customers who have their contract terms changed without notice or consent, like Minnesota customer John Povejsil, will be left with no meaningful remedy. As detailed in the affidavits from other Minnesota citizens filed with the district court, wireless customers aggrieved by the industry's deceptive practices frequently capitulate to unilateral contract changes because they do not have the time or money necessary to fight these companies and because they fear that their credit ratings will be harmed if they do not pay what the wireless providers demand. *See* C.A. App. 0323 (Cloutier, Jr. Aff. ¶ 9); C.A. App. 0441 (Palmer Aff. ¶ 7); C.A. App. 0422 (Macdonald Aff. ¶ 10); C.A. App. 0429-30 (Second Neal Aff. ¶¶ 10-11). This tragic and unjust situation can only be remedied if this Court steps in and reviews the decision below.

Similarly, if the decision below stands, wireless providers will be allowed to continue to impose one-sided, non-negotiable change-in-terms provisions in wireless contracts that allow the company – and only the company – to change the contract terms anytime without the customer's consent. Minnesota customers will be subject to

these one-sided provisions even though the Minnesota Legislature found these provisions fail to allow for meaningful assent to substantive contract term changes. The Eighth Circuit's decision will almost certainly be used by the wireless industry to argue that the other forty-nine States also are preempted from banning one-sided change-in-term provisions. As a result, millions of wireless consumers will continue to be subject to these abusive contracting practices.

II. The Eighth Circuit Erroneously Found That The Minnesota Act Regulates Rates And Is Preempted By Federal Law

The Eighth Circuit failed to follow this Court's established preemption standards and improperly concluded that subdivision 3 of the Act is preempted by 47 U.S.C. § 332. This Court recently reaffirmed the preemption standard that applies when states are acting in areas of traditional state authority, stating that courts are to presume that "a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" *See Bates*, 125 S. Ct. at 1801 (citations omitted). In such cases where two alternative readings of a federal statute are plausible, courts have a duty to "accept the reading that *disfavors* pre-emption." *See id.* (emphasis added).

The Eighth Circuit's attention to this Court's direction was purely salutary. The appeals court noted that federal courts "presume that Congress does not intend preemption of historic police powers of the States 'unless that was [its] clear and manifest purpose.'" Pet. App., *infra*, 5a (citation omitted). Yet, the Eighth Circuit completely ignored the required presumption against preemption. *Id.* at 4a-12a.

Instead, the court simply concluded, based on its own overly broad interpretation of "rate regulation," that requiring customer consent to substantive, mid-stream contract changes by wireless providers "regulates rates" and is preempted by 47 U.S.C. § 332(c)(3)(A). *Id.* at 12a. The Eighth Circuit did *not* find that it was Congress's "clear and manifest purpose" to preempt such a law. The Eighth Circuit's finding of preemption is erroneous and should be reversed by this Court.

A. Requiring Affirmative Customer Consent To The Extension Of A Contract Is Not "Rate Regulation"

Congress could not have been more clear when it enacted 47 U.S.C. § 332(c)(3)(A) – States are *only* preempted from regulating "rates charged by" and "entry of" commercial wireless providers. *See* 47 U.S.C. § 332(c)(3)(A). Congress expressly preserved the States' authority to regulate all "other terms and conditions" of commercial wireless service. *Id.* The Eighth Circuit erred when it found that requiring customer consent to an extension *in the length* of a wireless contract amounts to "impermissible rate regulation" and is preempted by 47 U.S.C. § 332(c)(3)(A). *See* Pet. App., *infra*, 9a.

The Eighth Circuit focused its analysis on subdivision 3 of the Act, which requires notice of, and affirmative customer consent to, any "substantive change" proposed by a provider. Pet. App., *infra*, 8a-12a. The Eighth Circuit recognized that subdivision 3 applies to two different and independent types of provider-initiated contract changes: (i) contract changes that could result in an extension of the *length of the contract*; and (ii) contract changes that could result in an *increase in the charge* to the customer under

the contract. Pet. App., *infra*, 9a. Nonetheless, the Eighth Circuit's preemption analysis focused solely on the second type of contract change: namely, a change resulting in an increase in the customer's charges. *See, e.g.*, Pet. App., *infra*, 9a. ("The requirement of subdivision 3 that consumers consent to any substantive change prevents providers from *raising rates* for a period of time. . . .") (emphasis added). The Eighth Circuit then broadly found that "subdivision 3 effectively regulates rates, and is preempted by § 332(c)(3)(A)." *Id.* at 12a.

Significantly, the Eighth Circuit did not find that subdivision 3 is preempted *only* as to contract changes resulting in an increase to customer charges. *See* Pet. App., *infra*, 8a-12a. Nor did it preserve the State's authority to require affirmative consent to contract changes involving only an *extension* in the length of the contract even though the issue was expressly raised below. *See id.*; *see also* Appellee's Brief and Addendum at 40. As a result, the Eighth Circuit preempted the States' authority to require affirmative customer consent to an extension in the length of the contract *with absolutely no findings* as to how such a requirement regulates the "rates charged by" wireless providers. *See* Pet. App., *infra*, 8a-12a. The Eighth Circuit's holding is erroneous and should be reversed on that basis alone.

Furthermore, the unsupported holding of the Eighth Circuit defies logic. A state law requiring customer consent to a wireless provider's proposed extension in the length of the contract is not preempted by the plain language of 47 U.S.C. § 332(c)(3)(A). By its terms, 47 U.S.C. § 332(c)(3)(A) only preempts the States from regulating "rates charged" and "entry." The length of a contract is not a "rate[] charged" because the wireless provider does not "charge"

the contract length. Rather, the length of the contract clearly falls within "other terms and conditions," which Congress expressly allowed the States to regulate. 47 U.S.C. § 332(c)(3)(A).[13] Further, when considered in light of the long-standing presumption against preemption, it is clear that 47 U.S.C. § 332(c)(3)(A) does not prohibit laws governing contract extensions.

B. Requiring Affirmative Customer Consent To Contract Changes That Could Result In An Increase In Price Is Not "Rate Regulation"

The Eighth Circuit also erred when it held that requiring customer consent to a mid-term contract change in the amount charged somehow "constitutes impermissible rate regulation" preempted by 47 U.S.C. § 332(c)(3)(A). *See* Pet. App., *infra*, 9a. In making this determination, the Eighth Circuit gave an impermissibly broad meaning to the language of 47 U.S.C. § 332(c)(3)(A), which prohibits the States from "regulat[ing] . . . the rates charged by any commercial mobile service. . . ." This conclusion is inescapable when considered in light of this Court's well-established presumption against preemption.

The Eighth Circuit stated that "'fixing rates'" of wireless providers is "rate regulation." Pet. App., *infra*, 9a (citing *In re Pet. of Pittencrieff Commc'ns, Inc.*, 13 F.C.C.R. 1735, 1745 (1997)). The Eighth Circuit determined that

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[13] In any event, requiring customer consent to a substantive contract change, whether a change to the length of the contract or the amount charged, is a regulation governing the contract change process, not "rates charged" by wireless providers, and is within the States' authority to regulate.

subdivision 3 "fixes" rates because the law "prevents providers from raising rates for a period of time" and held that subdivision 3 of the Act "constitutes impermissible rate regulation preempted by federal law." Pet. App., *infra*, 9a. In reaching this conclusion, the Eighth Circuit erred for two important reasons.

First, in 1993, when Congress amended 47 U.S.C. § 332 to adopt 47 U.S.C. § 332(c)(3)(A) in its current form, regulation of telephone and other utility rates was commonly accomplished by government agency oversight of rates. State and federal laws giving regulatory agencies the authority to oversee rates generally required that rates be reasonable. *See, e.g.*, Minn. Stat. §§ 237.06, 237.075 (1992); 47 U.S.C. § 201.

Importantly, it was well-established by 1993 that a rate regulated entity generally could charge only the rate on file with the relevant federal or state agency. The regulated company was not free to negotiate and charge the customer a rate different from the filed rate. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (stating that the filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority"); *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 494 (8th Cir. 1992) (finding the filed rate doctrine applies to landline phone rates filed with the Minnesota commission).

The Act does not "regulate" the "rates charged" by wireless providers within the meaning of 47 U.S.C. § 332(c)(3)(A) because the Minnesota law does not involve any state oversight of wireless rates. There is no state review of wireless rates for reasonableness. *Compare* Minn. Stat. § 325F.695, subd. 3 (2004) *with* Minn. Stat.

§§ 237.06, 237.075, subd. 5 (2004) (requiring rates charged for landline telephone service to be reasonable and authorizing the Minnesota commission to "fix" rates at reasonable amounts). Significantly, the Act does not prohibit the wireless provider from charging any rate for wireless service to which the wireless company and customer mutually agree, even if the rate is an "unreasonable rate." *See Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1074 (7th Cir. 2004) (holding that state law claims involving wireless charges were not preempted where the court was not required to inquire into the reasonableness of rates charged, and the claims did not impact entry). Nor does the Act require wireless providers to file their rates with the State. To the contrary, the Act leaves it to the customer and company to negotiate "the rates charged" by wireless providers.

Second, the Eighth Circuit improperly concluded that the Act regulates the rates charged by "fixing" rates. Importantly, the language in the FCC Order relied upon by the Eighth Circuit, which provides that States may not "fix[]" wireless rates, was written in response to a request pursuant to 47 U.S.C. § 332 for continued regulation of wholesale wireless rates by the Connecticut Department of Public Utility Control. *See* Pet. App., *infra*, 9a (citing *In re Pet. of Pittencrieff Commc'ns, Inc.*, 13 F.C.C.R. 1735, 1745 (1997) which cites to *In re Pet. of Conn. Dep't of Pub. Util. Control to Retain Regulatory Control of Rates of Wholesale Cellular Service Providers in the State of Conn.*, Report and Order ("*Connecticut Preemption Order*"), 10 F.C.C.R. 7025, 7060 (1995)). At the time, Connecticut law required that wholesale wireless rates be filed with the Connecticut agency, and be cost-justified. *See Connecticut Preemption Order* at 7046. In stark contrast to traditional rate regulation, the Minnesota Act does *not* "fix" rates at a dollar

amount on file with the State or require that the rates charged be cost-justified. *Compare* Minn. Stat. § 325F.695 (2004) *with* Minn. Stat. § 237.075, subd. 5 (2004) (providing that the "[C]ommission shall determine the rates [of the incumbent landline telephone company] to be charged . . . and shall *fix* them by order. . . .") (emphasis added).

Under the Act, if a company proposes a rate increase during the term of the contract and the customer does not affirmatively agree to the mid-term rate increase, the State is not "regulat[ing]" the "rates charged by" the wireless provider in violation of 47 U.S.C. § 332. As the district court correctly found:

> Nothing in the law prevents wireless providers from charging any rate the market will bear. Nothing in the law caps wireless rates.

Pet. App., *infra*, 25a.

Subdivision 3 of the Act simply governs the consent process for a change in an existing substantive contract term. This Act clearly falls within the "other terms and conditions" left by Congress to the States to regulate. The law is at its core a consumer protection measure, not a rate regulation measure.

Further, the Eighth Circuit's finding that the notice requirement in the Act "freezes rates for 60 days" is contrary to well established principles of statutory construction. Pet. App., *infra*, 9a. The Act simply requires notice "60 days before the change is proposed to take effect," and provides that the change may take effect if the customer "opts in" before the "proposed effective date." Minn. Stat. § 325F.695, subd. 3. The "proposed effective date" is properly read as just that – a "proposed" effective

date. Nothing in the law prohibits a contract change from going into effect immediately once the customer agrees to it. This interpretation is logical and consistent with established rules of statutory construction. *See Hince v. O'Keefe*, 632 N.W.2d 577, 582 (Minn. 2001) (noting that courts should construe statutes to avoid absurd results and should interpret statutes to avoid constitutional problems).

The Eighth Circuit's decision that subdivision 3 of the Minnesota Act is preempted by 47 U.S.C. § 332(c)(3)(A) runs afoul of this Court's clear directive that laws such as this are not to be preempted unless the court finds preemption is the "clear and manifest" intent of Congress. Tellingly, the Eighth Circuit cited *no* Congressional intent – let alone "clear and manifest" intent – to support its finding of preemption. The Eighth Circuit impermissibly and erroneously expanded the preemptive scope of regulation of "rates charged" as used in 47 U.S.C. § 332(c)(3)(A). Further, Petitioner's interpretation of 47 U.S.C. § 332(c)(3)(A) as permitting the States to require notice of and affirmative customer consent to substantive contract changes is clearly a plausible interpretation. The decision below cannot be reconciled with this Court's recent pronouncement that, in cases involving areas of traditional state authority, courts have a duty to accept a plausible interpretation of federal law that "*disfavors* pre-emption." *See Bates*, 125 S. Ct. at 1801 (emphasis added).

C. The Provisions Of The Minnesota Act Are Severable

This Court has established that state law governs whether a state statute is severable. *Leavitt v. Jane L.*,

518 U.S. 137, 139 (1996). Minnesota law contains a strong presumption in favor of severability. Minn. Stat. § 645.20 (2004).

Having found that subdivision 3 of the Act is preempted, the Eighth Circuit considered whether the remaining provisions of the Act dealing with customer-initiated changes (subdivision 4); requiring the customer be provided with a copy of the contract (subdivision 2); and setting forth the applicable definitions (subdivision 1) could be enforced. Pet. App., *infra*, 12a-15a. The Eighth Circuit incorrectly determined that these subdivisions are *not* severable from subdivision 3, governing provider-initiated changes. *Id.* In doing so, the Eighth Circuit failed to properly apply the strong presumption of severability under Minnesota Law. *See* Minn. Stat. § 645.20 (2004).

The Eighth Circuit erred because the remaining substantive provisions, subdivisions 4 and 2, stand on their own. The Minnesota Legislature clearly viewed the notice and consent requirements relating to customer-initiated changes in subdivision 4 as separate and distinct from the requirements governing provider-initiated changes in subdivision 3 because it specifically adopted distinct provisions for each. Given that subdivision 4 is not "inseparably connected with" subdivision 3, it logically follows that subdivisions 2 and 1 are also severable from subdivision 3. Subdivision 2, requiring wireless telecommunications companies to provide a copy of the contract to the customer, remains important because subdivision 4 is severable. Subdivision 1 sets forth the applicable definitions. Therefore, the Eighth Circuit critically erred when it determined that not one of the provisions of this vital consumer protection law is enforceable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2006

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-3198

Cellco Partnership, doing business as Verizon Wireless; Verizon Wireless, doing business as Verizon Wireless, (VAW) L.L.C.; Duluth MSA, doing business as Verizon Wireless, Limited Partnership; Midwest Wireless Holdings, L.L.C.; Midwest Wireless Communications, L.L.C.; American Cellular Corporation; Rural Cellular Corporation, doing business as Cellular 2000; Sprint Spectrum L.P.; AT&T Wireless Services of Minnesota, Inc.; Voicestream Minneapolis, Inc.; T-Mobile USA, Inc.,	*	Appeal from the United States District Court for the District of Minnesota.
Appellants,	*	
v.	*	
Mike Hatch, in his official capacity as Attorney General of Minnesota and not as an individual,	*	
Appellee.	*	
	*	

Cellular Telecommunications & Internet Association; Federal Communications Commission,

Amici on Behalf of Appellant,

AARP; National Association of State Utility Consumer Advocates; National Association of Consumer Advocates,

Amici on Behalf of Appellee.

Submitted: May 11, 2005
Filed: December 9, 2005

Before WOLLMAN, BYE, and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

Cellco Partnership and its co-appellants (collectively, "Cellco") appeal from the district court's partial denial of their request for a preliminary injunction against implementation and enforcement of Minnesota Statutes § 325F.695 ("Article 5").[1] The district court ruled that Cellco's claims – that Article 5 was preempted and that the statute was

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[1] The district court granted Cellco's request for a preliminary injunction barring Attorney General Hatch and employees of the State from "taking any action to prevent wireless communications providers from passing through to customers federally assessed fees," pursuant to its determination that Article 5 conflicted with 47 C.F.R. § 54.712(a), which authorized recovery of the fees. This portion of the district court's order is not challenged on appeal.

unconstitutionally vague – did not have a likelihood of success on the merits, and dissolved the temporary restraining order it had previously entered. We reverse and remand for entry of a permanent injunction.

I.

On May 29, 2004, the Governor of Minnesota signed into law Article 5 of House File No. 2151, entitled "Wireless Consumer Protection." Article 5 imposes several requirements on Cellco and other providers of wireless telecommunications services. The statute forbids the providers to implement changes in the terms and conditions of subscriber contracts that "could result" in increased rates or an extended contract term, unless they first obtain affirmative written or oral consent from the subscriber. Minn. Stat. § 325F.695, subd. 3; *see id.* § 325F.695, subd. 1(d). Article 5 also requires providers to deliver copies of the subscriber contracts to the subscribers, *id.*, subd. 2, and, in the event a subscriber proposes a change to the contract, to disclose clearly any rate increase or contract extension that could result from the change. *Id.*, subd. 4. The statute further requires providers to maintain recorded or electronic verification of the "disclosures" required by the law. Article 5 was scheduled to take effect on July 1, 2004, but on June 16, Cellco filed suit in the District of Minnesota seeking a declaration that, among other things, Article 5 was preempted by the Communications Act of 1934, 47 U.S.C. §§ 151-614, and invalid under several provisions of the United States Constitution. Cellco also sought an injunction against enforcement of Article 5.

The district court first granted a temporary restraining order against enforcement of Article 5, ruling that Cellco had "shown an initial likelihood of success on at least a portion of [its] preemption argument." (Add. at 24). On consideration of Cellco's request for a preliminary injunction, however, the court reached a different conclusion. The district court concluded that Cellco had not satisfied the standard for preliminary injunctions set forth in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc), with respect to its claim that Article 5 is preempted, except to the extent that Article 5 applied to Cellco's attempts to pass along the costs of contributions to the Universal Service Fund pursuant to 47 C.F.R. § 54.712(a). The district court also determined that Cellco did not meet the *Dataphase* test with respect to its claim that Article 5 is unconstitutionally vague. As a result, the district court dissolved its temporary restraining order effective September 15, 2004. We granted a stay pending appeal.

Although the district court analyzed the preemption question under the "likelihood of success on the merits" prong of the test for granting preliminary injunctions, *see Dataphase*, 640 F.2d at 113, Cellco now proposes without objection from the State that there are only legal issues unresolved on appeal. Accordingly, we consider Cellco's motion as one for a permanent injunction. *See Bank One v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999).

II.

Cellco urges that Article 5 is expressly preempted by a federal statute, § 332(c)(3)(A) of the Communications Act of 1934, which provides in relevant part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A). A "mobile service" is defined as a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves," *id.* § 153(27); *see id.* § 332(d), and it is undisputed that Cellco is a commercial mobile service ("CMRS" or "provider"). The parties also agree that Article 5 does not regulate market entry, so whether any part of Article 5 is expressly preempted by § 332(c)(3)(A) turns on whether the statute regulates "rates charged" by providers. Our interpretation of the scope of an express preemption clause "must rest primarily on a fair understanding of congressional purpose," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (internal quotation and emphasis omitted), and we presume that Congress does not intend preemption of historic police powers of the States "unless that was [its] clear and manifest purpose." *Id.* at 485.

Section 332(c)(3) was added to the Communications Act in 1982, *see* An Act to amend the Communications Act of 1934, Pub. L. No. 97-259, § 120(a), 96 Stat. 1087, 1096 (1982), and its original preemption language provided that "[n]o State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service." 47 U.S.C.

§ 332(c)(3) (1992). An amendment in 1993 gave § 332(c)(3)(A) its current form, introducing the commercial/private mobile service distinction and providing for state regulation of "other terms and conditions." *See* Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 394 (1993).

The legislative history of the 1993 amendment speaks only briefly and indirectly about the meaning of "rate" regulation. A report from the House Budget Committee elaborated on the meaning of "other terms and conditions," which the statute distinguishes from the regulation of "rates" and "market entry":

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.

As the agency charged with administering the Communications Act, *see* 47 U.S.C. § 151, the FCC has interpreted § 332(c)(3)(A) on several occasions, often relying on

the aforementioned legislative history.[2] The FCC has determined that a State's review of the rates charged by providers prior to implementation of the rates, where the review often occasioned delays of 30 days before new rate offerings could take effect, is "rate regulation" for purposes of § 332(c)(3)(A). *Pet. on Behalf of the State of Hawaii, Pub. Util. Comm'n*, 10 F.C.C.R. 7872, 7882 (1995). The Commission also has ruled that regulation of rates includes regulation of "rate levels and rate structures," such as whether to charge for calls in whole-minute increments and whether to charge for both incoming and outgoing calls, and that States are prohibited from prescribing "the rate elements for CMRS" and from "specify[ing] which among the CMRS services provided can be subject to

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[2] The FCC has filed an amicus brief in this case asserting that Article 5 is preempted by § 332(c)(3)(A) because Article 5 is not a "generally applicable" state contract or consumer fraud law. Cellco urges us to accord "some" deference to the FCC's litigating position, citing the Supreme Court's grant of deference to an agency's amicus brief where there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *See Auer v. Robbins*, 519 U.S. 452, 462 (1997). We note, however, that the FCC is in the midst of a rulemaking process designed to consider the merits of a rule similar to that espoused in the amicus brief. *See Truth-In-Billing & Billing Format*, 20 F.C.C.R. 6448, 6475-76 (2005) (second report and order, declaratory ruling, and second further notice of proposed rulemaking). The agency's position thus appears somewhat fluid, and perhaps short of "considered judgment." *See id.* at 6476 ("[W]e *tentatively* conclude that the line between the Commission's jurisdiction and states' jurisdiction over carriers' billing practices is properly drawn to where states only may enforce their own generally applicable contractual and consumer protection laws, albeit as they apply to carriers' billing practices.") (emphasis added). In any event, because our consideration of the FCC's previous adjudications and our interpretation of § 332(c)(3)(A) independently lead to our conclusion, we need not decide whether deference to the FCC's position in its brief is appropriate here.

charges by CMRS providers." *Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19898, 19907 (1999).

In light of the legislative history classifying billing information, practices, and disputes as "other terms and conditions," however, the FCC has concluded that "state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332." *Id.* at 19908. The FCC later clarified that while § 332(c)(3) "does not generally preempt the award of monetary damages by state courts based on state consumer protection, tort, or contract claims[,] . . . whether a specific damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case." *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, 17022 (2000). In reaching that conclusion, the Commission noted that the "indirect and uncertain effects" of damage awards pursuant to state contract and tort law are not the same as the effects of direct rate regulation, and that although such awards may increase the costs of doing business, these costs "fall no more heavily on CMRS providers than on any other business." *Id.* at 17034-35 (internal quotation omitted).

Cellco focuses its preemption arguments primarily on subdivision 3 of the Minnesota statute. Subdivision 3 is entitled "Provider-initiated substantive change," and it mandates that providers

> must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting

> the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

Minn. Stat. § 325F.695, subd. 3. A "substantive change" is defined in relevant part as "a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract." *Id.* § 325F.695, subd. 1(d).

We agree with the FCC that "fixing rates of . . . providers" is rate regulation, *see Pet. of Pittencrieff Communications, Inc.*, 13 F.C.C.R. 1735, 1745 (1997), and we conclude that subdivision 3 of the Minnesota statute constitutes impermissible rate regulation preempted by federal law. The requirement of subdivision 3 that consumers consent to any substantive change prevents providers from raising rates for a period of time, and thus fixes the rates. The 60-day notification period created by subdivision 3 effectively freezes rates for 60 days when the provider notifies a customer of a proposed change in rates. The State's position – that Article 5 imposes only a "window within which the customer has to decide whether or not to accept a change proposed by the wireless provider," and that rate changes could go into effect immediately upon the consumer's consent – strikes us as inconsistent with the plain meaning of the text of the statute. Subdivision 3 requires that providers notify customers of "any proposed substantive change . . . 60 days before the change is proposed to take effect," and this change may take effect only if the customer "opts in" before "the proposed

effective date." Minn. Stat. § 325F.695, subd. 3. A proposed change thus must include a proposed effective date, and modification of the "effective date" is not contemplated by the statute.

But even accepting the State's interpretation, under which rates may be changed as soon as a customer manifests assent, the statute still fixes rates for at least some customers to some degree. If even one customer declines to "opt in" to a provider's proposed rate increase, then the rate for that customer's service would be fixed for the term of the existing contract, often one or two years. Even assuming, *arguendo* (and contrary to our experience with human nature), that all consumers would willingly accept rate hikes when proposed, and thus "opt in" before the expiration of the 60-day period, subdivision 3 indisputably freezes rates for *some* period – at least until the consumer manifests acceptance. The statute thus requires providers to maintain rates different from those that would be charged if the providers were left to follow the terms of their existing contracts, which typically allow an adjustment of rates after reasonable notice of fewer than 60 days. (J.A. at 146, 149).

The State argues that subdivision 3 is a consumer protection measure that "further[s] the underlying traditional requirements of contract law as a way to protect consumer interests" by guarding consumers against unilateral contract changes. "Consumer protection matters," it notes, were among the matters listed by the House Budget Committee as illustrative of "terms and conditions" that would be open to state regulation under § 332(c)(3)(A). H.R. Rep. No. 103-11, at 261. We find this argument overbroad, and we are not persuaded. Any measure that benefits consumers, including legislation that restricts rate increases, can be said in some sense to

serve as a "consumer protection measure," but a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by § 332(c)(3)(A). To avoid subsuming the regulation of rates within the governance of "terms and conditions," the meaning of "consumer protection" in this context must exclude regulatory measures, such as Article 5, that directly impact the rates charged by providers.

Subdivision 3, moreover, goes beyond traditional requirements of contract law, and thus falls outside the scope of the "neutral application of state contractual or consumer fraud laws," which the FCC has said is permissible state regulation of wireless providers. This statute effectively voids the terms of contracts currently used by providers in one industry, and substitutes by statute a different contractual arrangement. The existing contracts exemplify an "opt-out" structure – that is, they permit the providers to effect rate increases upon reasonable notice to the customer, whose continued use of the service binds him to the new rate unless he affirmatively declines to accept the changes. (J.A. at 149). Subdivision 3 mandates an "opt-in" contract structure: the provider cannot increase rates unless the customer affirmatively accepts the changes. The State contends that the current structure used by the providers renders the contracts "illusory," because it permits the providers "unilateral[ly]" to "change the contract's terms," (Appellee's Br. at 33), but we are not convinced. There is no indication that "opt-out" contracts of the sort used by the providers are considered illusory under Minnesota's consumer protection statutes or its common law, and in fact, such contracts are generally accepted as legal and binding. *See Iberia Credit Bureau,*

Inc. v. Cingular Wireless LLC, 379 F.3d 159, 173-74 (5th Cir. 2004); *cf. Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983) (declaring enforceable the acceptance, by continued performance, of modification in a unilateral contract for employment). Subdivision 3, therefore, cannot be deemed a "neutral application of state contractual or consumer fraud laws" that avoids the preemptive force of the federal statute. *See Wireless Consumers Alliance*, 15 F.C.C.R. at 17025-06 [sic]. A waiting period on any proposed rate changes, whether it be for 60 days or some shorter period pending a customer's decision to "opt in," has a clear and direct effect on rates. We thus conclude that subdivision 3 effectively regulates rates, and is preempted by § 332(c)(3)(A).

III.

There remains the question whether the other subdivisions of Article 5 may be enforced independent of subdivision 3. Whether one provision of a statute is severable from the remainder is a question of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). In Minnesota, the remaining provisions of a statute shall be valid, "unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one," or "unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." Minn. Stat. § 645.20. To give these clauses independent meaning, we understand the former clause to forbid severance in cases where the remaining provisions are *not* incomplete or incapable of

being executed, but where the interrelationship of the void and non-void provisions nonetheless precludes the presumption that the legislature would have enacted only the latter provision. *See Archer Daniels Midland Co. v. State*, 315 N.W.2d 597, 600 (Minn. 1982) (concluding remaining provisions of statute, standing alone, were not severable, where legislative intent to prefer limited application of statute was "not at all clear"); *Bang v. Chase*, 442 F. Supp. 758, 771 (D. Minn. 1977) (three-judge court).

We believe that the remaining subdivisions of Article 5 – a definitional section, a provision requiring wireless providers to furnish customers with a copy of written contracts, and a subdivision regulating "customer-initiated changes" – are connected with and dependent upon subdivision 3. The legislative history shows that subdivision 3 was the motivating force behind Article 5. The principal Senate sponsor, for example, explained that "the reason for the genesis of this bill . . . is people in our area were contacting our local representative . . . and telling him that their contracts were being changed without their consent." (J.A. 361).

The three substantive subdivisions were then conceived together as a unified effort to regulate certain practices of wireless telecommunications service providers. The requirement of subdivision 2 that providers furnish customers with a written copy of *existing* contracts serves as foundation for the later subdivisions, which require disclosure of proposed changes to those existing contracts. As the principal House sponsor explained, "keep in mind we are just doing two things: One) we want to verify in the records that the customer did agree to a contract in the first place and two) if a unilateral change is made in that contract by the provider, the customer is off the hook."

(J.A. 384). Subdivisions 3 and 4 work in tandem as requirements for consent and disclosure, depending on whether a change in contractual terms is "provider-initiated" or "customer-initiated."

The legislature recognized that the regulatory provisions would place a burden on the industry, and potentially would raise costs for consumers. The principal House sponsor remarked that depending on how the legislation was crafted, "[i]t could turn into something that ends up costing everybody more money and it does kind of complicate the whole process." (J.A. 383). The legislature ultimately concluded that the expected benefits to the consumer outweighed concerns about costs to providers and the system, but it enacted a two-year sunset provision, so, as one representative put it, "we can all reevaluate whether or not that is cumbersome or not, or if it works as well as many think it may work." (J.A. 396; *see also* J.A. 387). "Provider-initiated" substantive changes were central to the development of Article 5, and we find it difficult to presume that the legislature would have enacted the two remaining substantive provisions standing alone, with their attendant costs to the system, if it had been precluded at the outset from regulating in the area of principal concern and perceived benefit to consumers – that is, provider-initiated changes. It also bears noting that one senator active in the legislative process surrounding Article 5 commented on the "complexities of all the moving pieces" in the proposed legislation, and on the need to ensure that each of the "multiple moving pieces" fit together in a final bill. (J.A. 394).

We conclude, therefore, that subdivisions 1, 2, and 4 are not severable from subdivision 3, and that Article 5 should be enjoined in its entirety. The remaining articles

of House File No. 2151 operate independently, and they remain valid. This conclusion makes it unnecessary for us to consider Cellco's contentions that subdivisions 1, 2 and 4 of Article 5 are unconstitutionally vague, because the subdivisions fail to define such important statutory terms as "customer" and "disclosure," and because the statute defines "substantive change" indefinitely as any modification of contract that "could result" in an increase in charges. *See Planned Parenthood of Idaho v. Wasden*, 378 F.3d 908, 937 (9th Cir. 2004). If and when the legislature revisits this area, it will be in a position to consider whether more precise definitions are appropriate.

* * *

For the foregoing reasons, we reverse the district court's partial denial of Cellco's request for a preliminary injunction and remand for entry of a permanent injunction against enforcement of Article 5.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

CELLCO PARTNERSHIP d/b/a Verizon Wireless; VERIZON WIRELESS (VAW) LLC d/b/a/ Verizon Wireless; DULUTH MSA LIMITED PARTNERSHIP d/b/a Verizon Wireless; MID-WEST WIRELESS HOLDINGS L.L.C.; MIDWEST WIRELESS COMMUNICATIONS L.L.C.; AMERICAN CELLULAR CORPORATION; RURAL CELLULAR CORPORATION d/b/a Cellular 2000; SPRINT SPECTRUM L.P.; WIRELESSCO, L.P., AT&T WIRELESS SERVICES OF MINNESOTA, INC.; VOICESTREAM MINNEAPOLIS, INC.; and T-MOBILE USA, INC.,

Plaintiffs,

v.

MIKE HATCH, in his official capacity as Attorney General of Minnesota and not as an individual,

Defendant.

Civil No.
04-2981 (JRT/SRN)

MEMORANDUM OPINION AND ORDER ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

September 3, 2004

Andrew G. McBride, **WILEY REIN & FIELDING**, 1776 K Street N.W., Suite 500, Washington, DC 20006; and Jeffrey John Keyes, **BRIGGS & MORGAN**; 2200 IDS Center, 80 South 8th Street, Minneapolis, MN 55402, for plaintiffs Cellco Partnership, Verizon Wireless (VAW) LLC, Duluth MSA Limited Partnership;

Jeffrey John Keyes, **BRIGGS & MORGAN**, 2200 IDS Center, 80 South 8th Street, Minneapolis, MN, 55402 for plaintiffs Midwest Wireless Holdings L.L.C.; Midwest Wireless Communications L.L.C.; American Cellular Corporation; Rural Cellular Corporation;

Kenneth Schifman, **SPRINT CORPORATION**, 6450 Sprint Parkway, Overland Park, KS 66251; and Teresa J. Kimker, **HALLELAND LEWIS NILAN SIPKINS & JOHNSON**, 220 6th Street South, Suite 600, Minneapolis, MN 55402, for plaintiffs Sprint Spectrum L.P. and WirelessCo, L.P.;

Seamus C. Duffy, **DRINKER BIDDLE & REATH**, One Logan Square, 18th & Cherry Streets, Philadelphia, PA 19103; and Barbara P. Berens, **KELLY & BERENS**, 3720 IDS Center, 80 South 8th Street, Minneapolis, MN 55402, for plaintiff AT&T Wireless Services of Minnesota, Inc.;

Michael R. Drysdale, **DORSEY & WHITNEY-MINNEAPOLIS**, 50 South 6th Street, Suite 1500, Minneapolis, MN 55402-1498; and Daniel B. Rapport, **FRIEDMAN KAPLAN SEILER & ADELMAN LLP**, 1633 Broadway, New York, NY 10019-6708 for plaintiffs VoiceStream Minneapolis, Inc. and T-Mobile USA, Inc.

Michael J. Vanselow, Cassandra Opperman O'Hern and Brian Sande, Assistant Attorneys

General, **OFFICE OF THE MINNESOTA ATTORNEY GENERAL**, 445 Minnesota Street, St. Paul, MN 55101, for defendant.

Plaintiffs, a group of national and regional wireless carriers, challenge Article 5 of H.F. No. 2151, Minn. Sess. L. CH. 261 ("Article 5"), and seek a preliminary injunction to prevent implementation and enforcement of the new law.[1] Plaintiffs maintain that Article 5 is illegal and unenforceable for a variety of reasons, and principally argue that the law constitutes rate regulation and is therefore preempted. Article 5 was scheduled to go into effect at the beginning of July, however, on June 29, 2004, after two oral arguments, and extensive briefing, the Court granted a Temporary Restraining Order enjoining the law's implementation until the Court could further consider plaintiffs' motion for a preliminary injunction. At defendant's request, the Court permitted additional briefing after the Temporary Restraining Order issued, but before the Court ruled on the preliminary injunction.

The Court reiterates its opinion that the question of whether Article 5 constitutes impermissible rate regulation or whether it simply codifies consumers' rights to a balanced and fair contract is a close issue. Nonetheless, for the reasons discussed below, the Court is persuaded that the majority of Article 5 is lawful, and therefore dissolves the Temporary Restraining Order. As set forth below, the Court grants the following, limited preliminary injunction. The Court will stay implementation of this Order until September 15, 2004.

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[1] All plaintiffs have joined in the motion for a preliminary injunction. (*See* Docket Nos. 4, 5, 14, 32, and 34.)

BACKGROUND

I. Congress's Regulation of the Telecommunications Industry

Congress governs and regulates the telecommunications industry through the Federal Communications Act. States are prohibited from regulating "the entry of or the rates charged by any commercial mobile service or any private mobile service." 47 U.S.C. § 332(c)(3)(A). The statute also has a "savings clause" which provides, "except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." *See also* 47 U.S.C. § 414 ("Nothing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provision of this chapter are in addition to such remedies.").

II. Article 5

The Minnesota Legislature passed the bill titled the "Consumer Protections for Wireless Consumers" statute (also referred to as the "Wireless Consumer Protection State" or "Article 5") with overwhelming bipartisan support. The challenged law provides:

> Subd. 3. [**PROVIDER-INITIATED CHANGE.**] A provider must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer

does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

Subd. 4. [**CUSTOMER-INITIATED CHANGE.**] If the customer proposes to the provider any change in the terms of an existing contract, the provider must clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change. The customer's proposed change is only effective if the provider agrees to the proposed change and the customer agrees to any resulting changes in the contract. The provider must maintain recorded or electronic verification of the disclosure for the duration of the contract period.

"Substantive change" is defined in Subdivision 1 as:

(d). "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract. "Substantive change" includes a modification in the provider's administration of an existing contract term or condition. A price increase that includes only the actual amount of any increase in taxes or fees, which the government requires the provider to impose upon the customer, is not a substantive change for the purposes of this section.

In defense of the legality of Article 5, defendant submitted transcripts of the testimony and debate in the Minnesota House and Senate related to the new law. (Cohran Aff'd.) The House and Senate heard testimony

from consumers who believed that their wireless contracts had been changed without their knowledge or consent. Representatives of wireless companies also testified before the legislators; the wireless representatives suggested that the new law was unnecessary, and indicated that consumers had adequate protections through the Consumer Code for Wireless Service,[2] and through complaints to government entities such as the Attorney General's Office. The bill's sponsors represented that the bill is designed to give cell phone users the opportunity to opt-out of cell phone contracts if a provider unilaterally alters the contract. (Cohran Aff'd at Attachment 3.) According to the sponsors, Article 5 simply requires wireless providers to inform consumers of the extra-contractual result of requested changes.

Lawmakers also heard testimony from consumers about when notification of potential changes to established contracts would be useful. Consumers testified that the notification of substantial changes in contracts (such as an extension of a contract term, or a switch from month-to-month to year-to-year) must occur at the time the consumer signs up for the change if the notification is to be effective. In addition, the transcripts reveal discussions about whether an opt in or an opt out provision would

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[2] The Consumer Code for Wireless Service ("CCWS") is a voluntary code of conduct to which many plaintiffs adhere. The CCWS is intended "to provide consumers with information to help them make informed choices when selecting wireless service, to help ensure that consumers understand their wireless service and rate plans, and to continue to provide wireless service that meets consumers' needs." The CCWS contains provisions regarding disclosure of rates, service areas, and other policies and practices.

better balance the competing interests at .ssue in Article 5.

ANALYSIS

In its previous Opinion and Order, the Court analyzed the *Dataphase* factors,[3] and determined that plaintiffs had shown some likelihood of success on the merits, and that on the whole, the *Dataphase* factors favored some limited relief. The Court has more fully considered the parties positions, and provides the following additional analysis of the *Dataphase* factors, incorporating by reference its previous Opinion and Order.

I. Likelihood of Success on the Merits

A. Preemption[4]

As the Court noted, 47 U.S.C. § 332(c)(3)(A) prevents states from regulating either the **entry** or the **rates** of wireless services. Congress did not, however, preempt all state laws that impact commercial mobile services. The statute, by its terms, provides an exception by allowing states to regulate the "other terms and conditions" of commercial mobile services. 47 U.S.C. § 332(c)(3)(A); *Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir. 2001).

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[3] *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

[4] The Court centered its previous analysis on the preemption arguments; the parties additional briefing continued in this vein, and therefore the Court will continue to focus on the preemption issue. The Court notes that defendant has reserved its opposition to any other claim and arguments plaintiffs may assert; in addition, plaintiffs address briefly the argument that Article 5 is void for vagueness.

Congress's intent is made clear in the legislative history, which reveals:

> it is the intent of the Committee that the states still would be able to regulate the terms and conditions of these [wireless] services. By "terms and conditions," the Committee intends to include such matters as customer **billing information** and **practices** and **billing disputes** and **other consumer protection matters**. . . . This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

H.R. Rep. No. 103-111 103rd Con, 1st Sess. (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

Congress's intended reservation to the states of the ability to legislate consumer protection matters is not surprising, considering the "long history of [states] regulating against unfair business practices." *Cedar Rapids Cellular Telephone v. Miller*, 280 F.3d 874, 880 (8th Cir. 2002). "Federal telecommunications law implicitly acknowledges the importance of this interest [the interest in protecting the public] by leaving states some latitude to 'protect the public safety and welfare' and 'safeguard the rights of consumers.'" *Id.* (quoting 47 U.S.C. § 253(b)).

Even with this explicit reservation to the states of "other terms and conditions," it is clear that if Article 5 is "rate regulation," it is preempted.[5] The parties vigorously dispute whether Article 5 is such regulation. While "rates" seems easily defined, the line between impermissible rate regulation, and permitted state regulation is not clearly

[5] The parties do not suggest that Article 5 regulates market entry.

demarked in the statute or case law. *See, e.g., Phillips v. AT&T Wireless*, No. 4:04-CV-40240, 2004 WL 1737385 (S.D. Iowa July 29, 2004) (discussing whether an early termination fee amounted to a "rate"). A law is not preempted merely because the law could increase wireless providers' costs of doing business. *Cellular Telecommunications Indus. Ass'n v. F.C.C.*, 168 F.3d 1332, 1336 (D.C. Cir. 1999). Plaintiffs strongly argue that Article 5 is "rate" regulation. Defendant describes Article 5 as a consumer protection bill that, while it might implicate rates, in no way regulates them.

Several courts have deemed various general regulatory statutes or common law theories of recovery not preempted. *See, e.g., Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1074 (7th Cir. 2004) (holding not preempted a putative class action alleging breach of contract, and characterizing the relief sought as "an accounting problem" the remedy for which would require the cell phone companies, at most to (1) adjust billing systems or (2) alter contracts to provide that roaming charges are billed separately – neither of which amounted to preempted rate regulation); *In re Long Distance Telecommunications Litig.*, 831 F.2d 627 (6th Cir. 1987) (holding not preempted plaintiffs' state law claims that providers failed to inform customers of practices for charging for uncompleted calls); *but see, e.g., Bastien v. AT&T Wireless Serv., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000) (plaintiff's claims, ostensibly for breach of contract, were preempted because the claims would have required AT&T to exceed the FCC's requirements regarding towers, signals, and rates).

Article 5 certainly implicates rates. It defines "substantial change" as any "modification to, or addition or deletion of, a term or condition in a contract that **could**

result in an increase in the charge to the customer under that contract." Article 5, subd. 1(d) (emphasis added). Although Article 5 is directed at wireless providers, the Court is no longer convinced that the law presents impermissible rate regulation. Article 5 manifests basic principles of contract law. Nothing in the law prevents wireless providers from charging any rate the market will bear. Nothing in the law caps wireless rates. Similarly, the law does not dictates [sic] whether a particular billing method is unreasonable. *Cf. In re Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19898, 1999 WL 1062835, at ¶ 23 (F.C.C. November 18, 1999) (FCC finding that lawsuits challenging the practice of billing in whole minute increments constituted such rate regulation). Instead, the law requires notice and informed consent to contract changes. As the FCC has observed, state law claims relating to the "disclosure of rates and rate practices are not generally preempted under Section 332." *Id.* at ¶ 23. Article 5 requires wireless providers to disclose rates, to obtain consent to rate increases, and to honor contractual obligations. Article 5 also prohibits changes to established contracts absent informed consent to those changes. In the view of the Court, this is not rate regulation, as that term has been defined by the FCC and the courts.

On the other hand, the Court remains convinced that Article 5 conflicts with FCC regulations regarding the federal Universal Service Fund ("USF"). FCC regulations require wireless carriers to remit to the FCC monetary support for the USF, and the Code of Federal Regulations expressly authorizes wireless carriers to recoup USF fees by recovering them directly from customers. 47 C.F.R. § 54.712(a). The plain language of Article 5 seems to prevent plaintiffs from continuing to recover the USF fees

directly from customers because Article 5 exempts from its notice and opt-in policy only those fees that are **required** by the federal government to be collected. Providers are authorized, but not required, to pass USF and other similar fees, such as those for enhanced 911 services, through to their consumers. Because the plain language of the statute appears to conflict with federal policy, the Court will continue to enjoin implementation and enforcement of this portion of the statute.

B. Void for Vagueness

Plaintiffs also assert that Article 5 is void for vagueness. Specifically, plaintiffs claim that Article 5's critical terms – such as "customer" and "substantive change" are impermissibly vague. Plaintiffs, as challengers to the statute, have the burden of establishing that the law is impermissibly vague in all of its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 497 (1982). Plaintiffs must also overcome the presumption that state statutes are constitutional. *Fitz v. Dolyak*, 712 F.2d 330, 333 (8th Cir. 1983) (state statutes are presumed constitutional). The Court applies a relaxed standard to this economic regulation which does not implicate fundamental rights and provides only for civil penalties. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

Courts, including those in Minnesota, consistently uphold consumer protection and related laws against claims that the laws are impermissibly vague. For example, in *United States v. Sun and Sand Imports, Ltd., Inc.*, 725 F.2d 184 (2d Cir. 1984), the Second Circuit upheld an economic regulation against a vagueness challenge. In

that case, the challenger was a manufacturer and distributor of children's garments, some of which the Consumer Products Safety Commission classified as sleepwear, but which failed to comply with the Flammable Fabrics Act ("FFA"), 15 U.S.C. §§ 1191-1204 (1982). The corporation argued that the FFA failed to give an adequate definition of children's sleepwear. *See id.* at 186. The Second Circuit held that there are "'few words [which] possess the precisions of mathematical symbols, [and] most statutes must deal with untold and unforeseen variations in factual situations.'" *Id.* at 187 (quoting *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952)). The Second Circuit upheld the regulation, noting that statutes and regulations will not become "impermissibly vague simply because it may be difficult to determine whether marginal cases fall within their scope." *Id. See also Kaufman v. ACS Sys., Inc.*, 2 Cal. Rptr. 3d 296 (Cal. Ct. App. 2003) (upholding Telephone Consumer Protection Act, which prohibits "unsolicited advertisement" defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission" in face of void for vagueness challenge); *Harjoe v. Herz Financial*, 108 S.W.3d 653 (Mo. 2003) (same); *People by Vacco v. Chazy Hardware, Inc.*, 675 N.Y.S.2d 770 (N.Y. Sup. 1998) (price gouging statute not void for vagueness).

Minnesota courts follow similar logic; for example, in *State v. Directory Pub. Servs, Inc.*, 1996 WL 12674 (Minn. Ct. App. Jan. 16, 1996), a business challenged several consumer protection laws, including Minnesota's Uniform

Deceptive Trade Practices Act,[6] and its False Statement in Advertising statute.[7] The laws prohibited conduct including advertising that "cause[d] likelihood of confusion or of misunderstanding" and forbade advertisements that contained "any material assertion, representation, or statement of fact which is untrue, deceptive or misleading." The court rejected the challenge, referring to the dictionary definition of the terms "deceptive" and noting that a person of ordinary intelligence could understand what was forbidden by the laws. *Id.* at *4-5.

Although Article 5 is not free from ambiguity, plaintiffs have not shown a strong likelihood of success on their void for vagueness challenge to this consumer protection statute. The terms in the statute are common terms, with ordinary meanings, and the plaintiffs are adequately on notice as to what conduct is prohibited.

II. Irreparable Harm

The Court discussed plaintiffs' claims of irreparable harm in its previous Opinion and Order. Included in that discussion were plaintiffs' claims of lost customer goodwill, an inability to recover increases in federal program contributions, and the unrecoverable expenditures plaintiffs claimed they will be forced to make in an effort to comply with this law. These remain legitimate concerns. However, the Court did not previously devote substantial discussion to the harms faced by consumers, some of which are potentially irreparable. The Court therefore focuses in this

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[6] Minn.Stat. § 325D.44, subd. 1 (1994).

[7] Minn.Stat. § 325F.67 (1994).

Opinion and Order on the harms faced by Minnesota consumers.

A review of the hearing transcript reveals more significant harm to consumers than the Court discussed in its initial Opinion and Order. Minnesota consumers testified that they faced, at a minimum, frustration and stress in dealing with non-responsive customer service representatives. Consumers also testified about the excessive time lost in attempting to correct billing and other errors. Testimony reflected the feelings of helplessness faced by consumers who were forced to attempt to "disprove" that they had agreed to what the consumer believed to be an adverse contract change. Legislators heard testimony that consumers felt they were deprived the benefit of the bargain they had struck with the wireless provider. At least one wireless customer testified that she eventually gave up, and paid a disputed bill, in part because of fear of harm to her credit report. There was also testimony that wireless consumer service representatives inform consumers that the consumer may either pay the disputed fee to the wireless provider or pay it to a collection agency. The Minnesota legislature determined that these consumers faced significant harm, and the Court agrees with that determination.

III. Public Interest and Balance of Harms

The Court discussed the conflicting public interests in its previous Opinion and Order. Those competing interests include proper deference to the will of the legislature, Minnesota's interest in consumer protection, and the strong public interest in deferring to the will of Congress.

Plaintiffs argue that the record keeping requirements are onerous, and therefore the balance of harms tips in favor of continuing the injunctive relief. However, the Court is not convinced that the record keeping is quite as onerous as plaintiffs suggest. The requirement is quite similar to what plaintiff companies indicate is already done. Specifically, testimony at the legislative hearings regarding Article 5 and affidavits submitted by the plaintiffs reveal that when changes to contracts are proposed, it is the wireless providers' policy to send notification of the change to consumers, and to allow some period of time to renege on the change. Article 5 simply codifies these practices, and requires that the notification occur on the front-end of the transaction. The legislature was aware that the record keeping requirements would burden wireless providers, but the legislature heard testimony from consumers which supports the record-keeping requirement. Specifically, consumers who disputed extension of contract terms, or other changes, indicated that wireless providers had not informed them of the adverse change, but that the wireless company claimed that it did. Consumers believed they were left with no recourse other than paying the disputed bill, and the legislature acted rationally, and within its authority, when it shifted the responsibility of maintaining records of such agreements to the wireless company. The legislature heard testimony that it would not be feasible for an individual consumer to hire an attorney to dispute the early termination fee. The consumer's alternative is to spend time, in some cases what appears to be a ridiculous amount of time, disputing the fee, only to have accounts turned over to collection agencies, and/or adversely affecting credit.

IV. Conclusion

Minnesota consumers can enforce contract rights through existing state common law and state statutes prohibiting unilateral changes in contracts. This is modern contract law at its most basic. It is therefore within the power of state legislatures to ensure that wireless providers honor existing contracts with consumers, without forcing consumers to go to court to enforce contracts against unilateral changes. Article 5 simply provides that assurance. The fact that Article 5 may impact the cost of doing business in the short run does not make it impermissible rate regulation under federal law. It is simply the state legislature doing what it has the power to do: protecting consumers from what it considers unlawful business practices. The Court will dissolve the Temporary Restraining Order, except to the extent the Order enjoined prohibition on "pass throughs" of federal fees, and allow Article 5 to go into effect on September 15, 2004.

ORDER

Based upon all of the files, records, and proceedings herein, and upon the argument of counsel, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' motion for a preliminary injunction [Docket Nos. 4, 5, 14, 32, 34] is **GRANTED IN PART**.

2. Until further order of the Court, the defendant and any officers or employees of the State of Minnesota, are enjoined from taking action to prevent wireless communications providers from passing through to customers federally assessed fees, whether those fees "are required" to be passed through to customers or "permitted" to be

passed through to customers. Such fees and fee increases are collectable **without** notice, and **without** a customer opt in. Further, no waiting period may apply before such fee increases are passed through.

3. No other provision of Article 5 is enjoined by this Order, and to the extent the Temporary Restraining Order prevented the implementation of other provisions of Article 5, the Temporary Restraining Order [Docket No. 47] is **DISSOLVED**.

4. The bond [Docket No. 48] posted in accordance with the Temporary Restraining Order shall be continued in accordance with Rule 65(c); and no additional bond shall be required.

5. This Order shall be stayed until September 15, 2004; the Temporary Restraining Order issued on June 29, 2004, shall remain in effect until this Order and Article 5 of H.F. No. 2151 take effect on September 15, 2004.

DATED: September 3, 2004
at Minneapolis, Minnesota.

/s/ John R. Tunheim
JOHN R. TUNHEIM
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

CELLCO PARTNERSHIP d/b/a Verizon Wireless; VERIZON WIRELESS (VAW) LLC d/b/a/ Verizon Wireless; DULUTH MSA LIMITED PARTNERSHIP d/b/a Verizon Wireless; MID-WEST WIRELESS HOLDINGS L.L.C.; MIDWEST WIRELESS COMMUNICATIONS L.L.C.; AMERICAN CELLULAR CORPORATION; RURAL CELLULAR CORPORATION d/b/a Cellular 2000; SPRINT SPECTRUM L.P.; WIRE-LESSCO, L.P.; AT&T WIRELESS SERVICES OF MINNESOTA, INC.; VOIC-ESTREAM MINNEAPOLIS, INC.; and T-MOBILE USA, INC.,

Plaintiffs,

v.

MIKE HATCH, in his official capacity as Attorney General of Minnesota and not as an individual,

Defendant.

Civil No. 04-2981 (JRT/SRN)

TEMPORARY RESTAINING [sic] **ORDER**

June 29, 2004

Andrew G. McBride, WILEY REIN & FIELDING, 1776 K St NW Ste 500, Washington, DC 20006 and Jeffrey John Keyes, BRIGGS & MORGAN; 2200 IDS Center, 80 South 8th St., Minneapolis, MN 55402 for plaintiffs Cellco Partnership, Verizon Wireless (VAW) LLC, Duluth MSA Limited Partnership;

Jeffrey John Keyes, BRIGGS & MORGAN, 2200 IDS Center, 80 South 8th St., Minneapolis, MN 55402 for plaintiffs for plaintiffs [sic] Midwest Wireless Holdings L.L.C.; Midwest Wireless Communications L.L.C.; American Cellular Corporation; Rural Cellular Corporation;

Kenneth Schifman, Sprint Corporation, 6450 Spring Parkway, Overland Park, KS 66251 and Teresa J. Kimker, HALLELAND LEWIS NILAN SIPKINS & JOHNSON, 220 6th Street South, Suite 600, Minneapolis, MN 55402, for plaintiffs Sprint Spectrum L.P. and WirelessCo, L.P.;

Seamus C. Duffy, DRINKER BIDDLE & REATH, One Logan Square, 18th & Cherry Streets, Philadelphia, PA 19103 and Barbara P. Berens, KELLY & BERENS, 3720 IDS Center, 8th Street, Minneapolis, MN 55402, for plaintiff AT&T Wireless Services of Minnesota, Inc.;

Michael R. Drysdale, DORSEY & WHITNEY – 50 South 6th Street, Suite 1500, Minneapolis, MN 55402-1498 and Daniel B. Rapport, FRIEDMAN KAPLAN SEILER & ADELMAN LLP, 1633 Broadway, New York, NY 10019-6708 for plaintiffs VoiceStream Minneapolis, Inc. and T-Mobile USA, Inc.

Cassandra Opperman O'Hern and Brian Sande, MINNESOTA ATTORNEY GENERAL, 445 Minnesota Street, St. Paul, MN 55101 for defendant.

Plaintiffs, a group of national and regional wireless carriers, challenge Article 5 of H.F. No. 2151, Minn. Sess. L. CH. 261 ("Article 5"), which is scheduled to take effect on Wednesday, July 1, 2004. Plaintiffs seek an immediate injunction prohibiting the Attorney General from enforcing Article 5.[1] The Court held a short telephone conference regarding plaintiffs' motion for preliminary injunctive relief on June 23, 2004, and heard more extensive oral argument on June 28, 2004. For the reasons set forth below, the Court grants the following temporary restraining order. During oral argument, the parties indicated that no additional briefing would be required for the Court's consideration of a preliminary injunction. The purpose of this Order, therefore, is to preserve the status quo until the Court can more fully consider the parties' positions. The Court considers the motions fully submitted and will issue an Opinion and Order on the preliminary injunction as soon as practicable.

BACKGROUND

The relevant portions of the challenged law provide:

> Subd. 3. [PROVIDER-INITIATED CHANGE.] A provider must notify the customer in writing of

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[1] Plaintiffs Cellco Partnership d/b/a Verizon Wireless; Verizon Wireless (VAW) LLC d/b/a Verizon Wireless; Duluth MSA Limited Partnership d/b/a Verizon Wireless filed the initial motion for a temporary restraining order. [Docket No. 4]. This motion was joined by plaintiffs Rural Cellular Corp., Midwest Wireless Holdings L.L.C., Midwest Wireless Communications L.L.C., and American Cellular Corp. [Docket No. 5]. Plaintiff Sprint Spectrum L.P. joined the motion [Docket No. 14]; as did AT & T Wireless Services of Minnesota, Inc. [Docket No. 32], and plaintiff VoiceStream Minneapolis, Inc., and T-Mobile USA, Inc. [Docket No. 34].

any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

Subd. 4. [CUSTOMER-INITIATED CHANGE.] If the customer proposes to the provider any change in the terms of an existing contract, the provider must clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change. The customer's proposed change is only effective if the provider agrees to the proposed change and the customer agrees to any resulting changes in the contract. The provider must maintain recorded or electronic verification of the disclosure for the duration of the contract period.

"Substantive change" is defined in Subdivision 1 as

(d). "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract. "Substantive change" includes a modification in the provider's administration of an existing contract term or condition. A price increase that includes only the actual amount of any increase in taxes or fees, which the government

> requires the provider to impose upon the customer, is not a substantive change for the purposes of this section.

Also relevant to this case is Congress's regulation of telecommunications. In particular, plaintiffs argue that 47 U.S.C. § 332 preempts any state law that touches on rate-making.

47 U.S.C. § 332(c)(3)(A) provides that

> no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service

The next clause of the statute has been termed a "savings clause" and provides:

> except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

ANALYSIS

The parties agree that the *Dataphase* factors control this motion. The following four factors are relevant to the Court's consideration of plaintiffs' request for a TRO/preliminary injunction: (1) that there is a likelihood of success on the merits; (2) that the movant will suffer irreparable harm absent the restraining order; (3) that the balance of harms favors the movant; and (4) that the public interest favors the movant. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

I. Likelihood of Success on the Merits

A. Preemption[2]

There is no dispute that 47 U.S.C. § 332(c)(3)(A) prevents states from regulating either the entry or the rates of wireless services. There is also no dispute, however, that the statute provides an exception to this rule by allowing states to regulate the "other terms and conditions" of commercial mobile services. 47 U.S.C. § 332(c)(3)(A). The plain language of the statute, subsequent case law, and legislative history establish that Congress did not intend to preempt all state law.[3] Therefore, for plaintiffs to show a likelihood of success on this argument, they must demonstrate that "the broader and more familiar doctrine of ordinary preemption" applies. *Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir. 2001) (citations omitted).

Plaintiffs' overall success on the merits hinges on their ability to demonstrate that Article 5 amounts to a prohibited rate regulatory scheme. Although it is clear that Article 5 will increase plaintiffs' costs of doing business,

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[2] Plaintiffs suggest that the "heart" of their claim is that "this is a clear case of state regulation preempted by section 332(c)(3) of the Communications Act." (*Pl. Reply Brief* at 5.) Therefore, the Court focuses its preliminary analysis on the preemption arguments.

[3] "[I]t is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and **other consumer protection matters**; facilities citing issues (e.g., zoning); transfers of control. . . . This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions.'" H.R. Rep. No. 103-111 103rd Con, 1st Sess. (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

that is not enough. "To equate state action that may increase the cost of doing business with rate regulation would . . . forbid nearly all forms of state regulation, a result at odds with the 'other terms and conditions' portion of the [statute]." *Cellular Telecommunications Indus. Ass'n v. F.C.C.*, 168 F.3d 1332, 1336 (D.C. Cir. 1999). At the same time, this statute is clearly aimed, in part, at rates. Specifically, the definition of "substantial change" which is integral to the statute's function is directed at "modification to, or addition or deletion of, a term or condition in a contract that **could result in an increase in the charge** to the customer under that contract." Article 5, Subd. 1(d) (emphasis added).

Article 5 is certainly closer to rate regulation than those cases, cited by both parties, in which a general regulatory statute or common law theory of recovery was deemed not preempted. *See, e.g., Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1074 (7th Cir. 2004) (holding not preempted a putative class action alleging breach of contract, and characterizing the relief sought as "an accounting problem" the remedy for which would require the cell phone companies, at most to (1) adjust billing systems or (2) alter contracts to provide that roaming charges are billed separately – neither of which amounted to preempted rate regulation); *In re Long Distance Telecommunications Litig.*, 831 F.2d 627 (6th Cir. 1987) (holding not preempted plaintiffs' state law claims that providers failed to inform customers of practices for charging for uncompleted calls); *but see also Bastien v. AT&T Wireless Serv., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000) (plaintiff's claims, ostensibly for breach of contract, were preempted because the claims would have required

AT&T to exceed the FCC's requirements regarding towers, signals, and rates).

Article 5 is distinguishable from the cited cases because Article 5 is not a "generally applicable" consumer protection law. Instead, it is directed only at providers of cellular services. *Compare* Article 5 *with Fedor*, 355 F.3d at 1072-73 ("claims stemming from state contract or consumer fraud laws governing disclosure of rates or rate practices are not generally preempted") (citations omitted) *and Cellular Telecommunications Indus.*, 168 F.3d at 1336 (discussing more general consumer protection laws). If Article 5 does not amount to rate regulation, it is very close. Plaintiffs have shown some likelihood of success on this claim, and therefore the Court considers this factor to be in favor of granting temporary injunctive relief.

Plaintiffs also claim that Article 5 conflicts with FCC regulations implementing certain federal programs. In particular, plaintiffs suggest that Article 5 conflicts with the FCC rules regarding the federal Universal Service Fund ("USF"). FCC regulations require wireless carriers to remit to the FCC monetary support for the USF, and the Code of Federal Regulations expressly authorizes wireless carriers to recoup USF fees by recovering them directly from customers. 47 C.F.R. § 54.712(a).

Despite this authorization, the plain language of Article 5 seems to prevent plaintiffs from continuing to recover the USF fees directly from customers. Article 5 exempts from its notice and opt-in policy only those fees that are **required** by the federal government to be collected. Providers are authorized, but not required, to pass USF and other similar fees, such as those for enhanced 911 services, through to their consumers. Because the

plain language of the statute appears to conflict with federal policy, the plaintiffs have shown an initial likelihood of success on the merits of this portion of their challenge to the statute.

Because the Court finds that plaintiffs have shown an initial likelihood of success on at least a portion of their preemption argument, the Court will not address plaintiffs' alternate grounds for challenging the statute. Instead, the Court turns to the remaining *Dataphase* factors.

II. Irreparable Harm

Plaintiffs claim that they face irreparable harm in the form of lost customer goodwill, the inability to recover increases in federal program contributions, and the unrecoverable expenditures that plaintiffs will be forced to make in an effort to comply with this law by July 1, 2004. Plaintiffs also claim that it will be impossible to effectively train all of its customer service representatives or to put into place adequate methods of preserving records, prior to Article 5's effective date. Plaintiffs further emphasize that they compete directly with wire telephony services, and Article 5 puts them at a competitive disadvantage to traditional wire service providers.

The Court is persuaded that plaintiffs have established a showing of irreparable harm, should Article 5 take effect July 1, 2004.

III. Public Interest and Balance of Harms

Conflicting public interests are implicated in this matter. Defendant notes that the judicial branch cannot lightly dispute a determination by the political branches

that the interests at stake are compelling. (*Def. Brief* at 4 (quoting *Finzer v. Barry*, 798 F.2d 1450, 1459-60) (D.C. Cir. 1986))). Defendant further articulates Minnesota's obvious interest in protecting its consumers from unilateral changes to its contracts. The Court has reviewed summaries by employees of the Attorney General's office detailing legitimate complaints by Minnesota cell phone customers. On the other hand, the Court must also consider the strong public interest in deferring to the will of Congress, including Congress's goal of preventing states from regulating rates, and Congress's goal of allowing market forces to shape the wireless industry.

Despite these interests, plaintiffs have established that these factors favor the issuance of temporary, limited relief. Plaintiffs have demonstrated that they face significant expense, which could be for naught if the law is modified or found unenforceable. In contrast, the potential "harm" to consumers is mitigated substantially by the application of Minnesota's generally applicable consumer protection and contract laws. The Attorney General characterizes Article 5 as an unremarkable notice statute that simply codifies consumers' rights to have their contract terms respected. In essence, the Attorney General suggests that Article 5 merely requires cellular service providers to notify consumers of potential contract modifications, and obtain (and record and maintain) the customers' consent to that change. If this is an accurate interpretation of Article 5, there will be little harm to consumers if the implementation is delayed a short time, because Minnesota consumers will be able to protect their contractual rights via standard contract and consumer protection laws.

In the Court's view, the question of whether Article 5 constitutes impermissible rate regulation or whether it simply codifies consumers' rights to a balanced and fair contract is a very close issue. The parties and the people of Minnesota will benefit from the Court having sufficient time to carefully review this close question. So for the express purpose of preserving the status quo as much as possible and minimizing the possibility of irreparable harm until the Court has had an opportunity to rule on plaintiffs' motion for injunctive relief, the Court issues the following order.

ORDER

Based upon all of the files, records, and proceedings herein, and upon the argument of counsel, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' motion for a temporary restraining order [Docket Nos. 4, 5, 14, 32, 34] is **GRANTED IN PART**.

2. Until further order of this Court granting or refusing a preliminary injunction or dissolving this Temporary Restraining Order, a Temporary Restraining Order is hereby entered preventing the defendant and any officers or employees of the State of Minnesota from taking action to enforce or attempt to enforce any provision of Article 5 of H.F. No. 2151.

3. In accordance with Rule 65(c) of the Federal Rules of Civil Procedure, plaintiffs shall post a bond with the Clerk in the amount of $ 50,000.00 for the payment of such costs and damages as may be incurred or suffered by

defendant in the event defendants are found to have been wrongfully enjoined or restrained.

DATED: June 29, 2004
at Minneapolis, Minnesota.

s/ John R. Tunheim
JOHN R. TUNHEIM
United States District Judge

APPENDIX D

RELEVANT STATUTORY PROVISIONS

1. 47 U.S.C. §153(27) provides in relevant part:

* * *

The term "mobile service" means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.

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2. 47 U.S.C. §332(c)(3)(A) provides:

* * *

Notwithstanding section 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall

exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that –

> **(i)** market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> **(ii)** such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

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3. 47 U.S.C. §332(d) provides in relevant part:

* * *

For purposes of this section –

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission.

* * *

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4. Minn. Stat. §325F.695 (2004) provides:

Minn. Stat. §325F.695 CONSUMER PROTECTIONS FOR WIRELESS CUSTOMERS.

Subdivision 1. **Definitions.** The definitions in this subdivision apply to this section.

(a) "Contract" means an oral or written agreement of definite duration between a provider and a customer, detailing the wireless telecommunications services to be provided to the customer and the terms and conditions for provision of those services.

(b) "Wireless telecommunications services" means commercial mobile radio services as defined in Code of Federal Regulations, title 47, part 20.

(c) "Provider" means a provider of wireless telecommunications services.

(d) "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract. "Substantive change" includes a modification in the provider's administration of an existing contract term or condition. A price increase that includes only the actual amount of any increase in taxes or fees, which the government requires the provider to impose upon the customer, is not a substantive change for purposes of this section.

Subd. 2. **Copy of contract.** A provider must provide each customer with a written copy of the customer's contract between the provider and the customer within 15 days of the date the contract is entered into. The provider may meet the requirement to provide a written copy of the contract by providing an electronic copy of the contract at the customer's request. A provider must maintain verification that the customer accepted the terms of the contract for the duration of the contract period.

Subd. 3. **Provider-initiated substantive change.** A provider must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

Subd. 4. **Customer-initiated change.** If the customer proposes to the provider any change in the terms of an existing contract, the provider must clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change. The customer's proposed change is only effective if the provider agrees to the proposed change and the customer agrees to any resulting changes in the contract. The provider must maintain recorded or electronic verification of the disclosure for the duration of the contract period.

Subd. 5. **Expiration.** This section expires August 1, 2007.

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5. Minn. Stat. §645.20 (2004) provides:

Minn. Stat. §645.20. CONSTRUCTION OF SEVERABLE PROVISIONS.

Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

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(3)

No. 05-1159

FILED

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SUPREME COURT

IN THE

Supreme Court of the United States

MIKE HATCH,
Attorney General of Minnesota,

Petitioner,

v.

CELLCO PARTNERSHIP
d/b/a VERIZON WIRELESS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Eighth Circuit correctly held that Section 332 of the Communications Act, which prohibits any state action "to regulate . . . the rates charged by any commercial mobile service," 47 U.S.C. § 332(c)(3)(A), expressly preempts the provision of a Minnesota statute that: (i) creates a 60-day waiting period for increases in wireless rates, thus freezing rates for at least that period of time; and (ii) enacts an approval mechanism for rate increases that also fixes rates for the entire term of at least some existing wireless service agreements.

2. Whether the Eighth Circuit correctly held that the preempted provision was not severable, under Minnesota law, from the remainder of the challenged statute.

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29, the Respondents provide the following corporate disclosures:

1. Cellco Partnership d/b/a Verizon Wireless ("Cellco" or "Verizon Wireless" or "VZW") is a Delaware general partnership with debt in the hands of the public. Cellco has seven partners in total. Five of the partners, representing 55% of the interest in Cellco, are ultimately owned by Verizon Communications Inc. ("Verizon"). These partners are: Bell Atlantic Cellular Holdings, L.P.; NYNEX PCS Inc.; PCSCO Partnership; GTE Wireless Incorporated; and GTE Wireless of Ohio Incorporated (collectively, the "Verizon Partners"). None of the Verizon Partners is publicly held. Two of the partners, representing 45% of the interest in Cellco, are ultimately owned by Vodafone Group Plc ("Vodafone"). These partners are: PCS Nucleus, L.P. and JV PartnerCo, LLC (collectively, the "Vodafone Partners"). None of the Vodafone partners is publicly held.

2. Verizon is a publicly held Delaware corporation. Vodafone is a publicly held British corporation. Neither Verizon nor Vodafone has a parent company, and no publicly held company has a 10% or greater ownership in either entity.

3. Verizon Wireless (VAW) LLC d/b/a Verizon Wireless ("Verizon Wireless VAW") is a Delaware limited liability company whose sole member is Cellco. Verizon VAW is not publicly held.

4. Duluth MSA Limited Partnership d/b/a Verizon Wireless ("Verizon Wireless Duluth") is a Delaware limited partnership. Its general partner is AirTouch Minnesota, LLC

("AirTouch Minnesota"), a Delaware limited liability company whose sole member is Cellco. Air Touch Minnesota also holds a limited partner interest in Verizon Wireless Duluth. Air Touch Minnesota's limited partner is Chequamegon Cellular, Inc., a Colorado corporation whose sole shareholder is Cellular Inc. Network Corporation. Cellular Inc. Network Corporation is a Colorado corporation whose sole shareholder is CommNet Cellular Inc. CommNet Cellular Inc. is a Colorado corporation whose sole shareholder is Cellco. Neither Verizon Wireless Duluth, AirTouch Minnesota LLC, Chequamegon Cellular, Inc., Cellular Inc. Network Corporation, nor CommNet Cellular Inc. is publicly held.

5. Midwest Wireless Holdings, L.L.C. and Midwest Wireless Communications, L.L.C. (collectively "Midwest Wireless") have no parent company, and are privately held limited liability companies. There is no publicly held company that owns 10% or more of their stock.

6. American Cellular Corporation ("ACC") is a subsidiary corporation of Dobson Communications Corporation ("Dobson"). Dobson is a publicly held corporation that owns more than 10% of ACC's stock. Other than Dobson, there is no publicly held corporation that owns 10% or more of ACC's stock.

7. Rural Cellular Corporation d/b/a Unicel ("RCC") has no parent company and is a publicly traded company. There is no publicly held corporation that owns 10% or more of RCC's stock.

8. Sprint Spectrum L.P., a Delaware limited partnership, consists of: (1) general partner Sprint Spectrum Holding Company L.P., a Delaware limited partnership; and (2) limited partner MinorCo., L.P., a Delaware limited partnership.

9. WirelessCo, L.P., a Delaware limited partnership, consists of: (1) general partner Sprint Spectrum L.P.; and (2) limited partner MinorCo, L.P.

10. The principal place of business for Sprint Spectrum, L.P., WirelessCo, L.P., Sprint Spectrum Holding Company L.P., and MinorCo, L.P. ("the Sprint Partnerships") is Reston, Virginia. None of the Sprint Partnerships is publicly traded. All of the Sprint Partnerships are indirectly owned by Sprint Nextel Corporation. Sprint Nextel Corporation's stock is publicly traded under the symbol S.

11. AT&T Wireless Services of Minnesota, Inc. was merged into New Cingular Wireless PCS, LLC on December 31, 2004. New Cingular Wireless PCS, LLC is wholly owned by Cingular Wireless LLC and Cingular Wireless LLC's wholly-owned subsidiaries. Cingular Wireless LLC is wholly owned by AT&T Inc. and BellSouth Corporation and their wholly-owned subsidiaries. AT&T Inc. and BellSouth Corporation are both publicly-traded companies that own, either directly or through wholly-owned subsidiaries, more than 10% of New Cingular Wireless PCS, LLC and Cingular Wireless LLC. No other publicly-traded company owns an interest in New Cingular Wireless PCS, LLC or Cingular Wireless LLC. AT&T Inc. and BellSouth Corporation have no corporate parents, and no publicly-traded company owns 10% or more of either company.

12. The parent company of VoiceStream Minneapolis, Inc., is VoiceStream Central Operating Company, Inc. VoiceStream Central Operating Company is not a publicly held corporation. An indirect parent company of VoiceStream Minneapolis Inc., is T-Mobile USA, Inc.

13. The parent company of T-Mobile USA, Inc. is T-Mobile Global Holding, GmbH. An indirect parent of T-Mobile USA, Inc., is Deutsche Telekom AG, which is a publicly held corporation.

14. Other than the indirect parent relationship of Deutsche Telekom AG as herein described, there is no publicly held corporation that owns 10% or more of either VoiceStream Minneapolis, Inc., or T-Mobile USA, Inc.

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INTRODUCTION AND SUMMARY OF REASONS TO DENY THE PETITION

Petitioner asks this Court to grant certiorari in order to review what he himself describes as a novel question, and as to which he alleges no conflict of authority whatsoever. No conflict is alleged because there is none. Indeed, it is clear from the petition for certiorari itself that the application of 47 U.S.C. § 332(c)(3)(A) ("Section 332(c)(3)(A)" or "Section 332") to state "consumer protection" laws aimed at wireless service providers, such as Minn. Stat. § 325F.695 (2004) (codifying 2004 Minn. Laws ch. 261, art. 5) ("Article 5"), is a matter that is now beginning to percolate in the state and federal legal systems.

Petitioner's assertion that the Eighth Circuit's decision could be interpreted to strip the States of all ability to police any unfair business practices in the wireless industry, and that this case thus qualifies as one of exceptional national importance, is fundamentally flawed. *First*, the assertion misapprehends the actual holding of the Court of Appeals with respect to Section 332(c)(3)(A). Far from "overly expansive," Pet. 8, the Eighth Circuit's reading of the statutory ban on "any" state action "to regulate . . . the rates charged" by wireless service providers – namely, that it precludes state action to "freeze" or "fix" retail rates – is well within the core of the statutory language and purpose and administrative precedent interpreting Section 332(c)(3)(A). *Second*, the claim is based on nothing more than speculation as to the future effect of the Eighth Circuit's decision. *Third*, the argument is premised on a persistent mischaracterization of the wireless industry's practices and ignores the many remedies for consumers and States left untouched by the Eighth Circuit's invalidation of Article 5. At bottom, then, Petitioner seeks only the correction of alleged errors below.

Even if this Court were to find that the Eighth Circuit's decision is worthy of review, this case suffers from fatal vehicular flaws. *First*, Article 5 is set to expire on August 1, 2007. *Second*, members of the Minnesota Legislature have introduced legislation to amend Article 5, in part in an attempt to cure the statute's various legal defects. There is no point in this Court reviewing the decision of the Court of Appeals with respect to a state statute that will shortly cease to exist and may also be superseded. If the Court were to grant certiorari and Article 5 expired (or was modified) before this Court could render its judgment, the controversy would be mooted. *Finally*, any decision by this Court reversing the judgment below may not ultimately determine the outcome of this case. Respondents based their arguments for preliminary relief in the Eighth Circuit not just on express preemption under Section 332 but also on other preemption grounds (conflict and implied preemption) and the unconstitutionally vague nature of Article 5; Respondents brought additional claims in the District Court that would also be viable for adjudication on any remand.

In any event, there is no error in any of the Court of Appeals' analysis. The Eighth Circuit correctly determined that Section 332's ban on rate regulation covers state action that fixes the rates of wireless service providers, as noted above. The Eighth Circuit then properly applied that rule of federal law to the specific piece of state legislation at issue here, finding that subdivision 3 of Article 5 unlawfully fixes wireless rates in several ways. Specifically, the Court found that: (i) the statute's 60-day waiting period for increases in wireless rates freezes rates for at least that period of time; (ii) the approval mechanism requiring customers to "opt in" to rate increases fixes rates, for those customers who decline to opt in, for the entire term of their existing wireless service agreements; and (iii) even with respect to customers who might agree to a price increase, their rates would be frozen until that assent was manifested. While Petitioner here contests the correctness of the first finding

described above, he does not even address the two alternative conclusions of the Court of Appeals, which are themselves adequate and independent grounds to sustain a finding of preemption. Last, the Court of Appeals rightly concluded that Minnesota law did not permit the severance of the remaining provisions of Article 5 from the preempted provision.

In sum, this case involves the application of a federal statute – the Eighth Circuit's interpretation of which comports with all existing precedent, including that of the expert agency charged with its implementation – to a particular state statute that is scheduled to expire in 2007 and may also be substantially modified. The Court of Appeals provided multiple grounds for its determination that subdivision 3 regulates rates, only one of which Petitioner challenges. Moreover, to the extent the case presents larger questions about the validity of state wireless consumer protection laws under Section 332, those questions are at this point in time starting to wind their way through the federal administrative process and the state and lower federal courts. This is not the stuff of certiorari. The petition should be denied.

STATEMENT OF THE CASE

A. Legal and Factual Background

1. Section 332(c)(3)(A) Establishes Exclusive Federal Jurisdiction over Wireless Rates.

Due to the inherently interstate nature of radio-based communications, wireless communications services have long been regulated at the federal level. *See Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933) (explaining that, because "[n]o state lines divide the radio waves, . . . national regulation is . . . essential to the efficient use of radio facilities"). At their inception in the early 1980s, however, modern wireless communications common carrier services, such as cellular telephone service, were subject to the same system of dual state and federal regulation that applied to

traditional wireline telephone services. *See* 47 U.S.C. § 152; *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

In order to speed the development of competition in the wireless industry, Congress amended the Communications Act in 1993 to "dramatically revise the regulation of the wireless telecommunications industry" with respect to rates. *Conn. Dep't of Pub. Util. Control v. FCC*, 78 F.3d 842, 845 (2d Cir. 1996). These sweeping changes had two principal components. *First*, in Section 332, Congress expressly prohibited "*any*" state or local regulation of the "rates charged by" wireless phone carriers. 47 U.S.C. § 332(c)(3)(A) (emphasis added). Congress specified in Section 332 that the statute does not operate to preempt state or local authority to regulate the "*other* terms and conditions" of wireless service. *Id.* (emphasis added). *Second*, Congress amended the Communications Act to *exclude* wireless phone services from the general prohibition on regulation of *intrastate* telecommunications services, thereby exempting wireless services from the system of dual state and federal regulations that governs traditional wireline telephone services. *Id.* § 152(b). By these changes, Congress intended "to establish a national regulatory policy for [wireless telephone service], not a policy that is balkanized state-by-state." *Petition of California and California Public Utilities Commission*, 10 FCC Rcd. 7486, 7499 (¶ 24) (1995) (emphasis and footnote omitted).

As a result of this Congressional policy choice, the wireless industry has become vigorously competitive and nationally ubiquitous. This competition has yielded tremendous benefits for consumers, such as increased choices among service providers and rate plans, as well as consistently declining prices. *See Tenth Annual CMRS Competition Report*, WT Dkt. No. 05-71, FCC 05-173, at 76-77 (¶ 204) (Sept. 30, 2005) ("*2005 Competition Report*") ("U.S. consumers continue to benefit from robust competition in the CMRS marketplace."); *id.* at 4-5

(¶ 4) ("Consumers continue to pressure carriers to compete on price and other terms and conditions of service . . . ."). Highly popular with consumers are national "one-rate" calling plans, which are offered on a uniform basis across the country. *See id.* at 38-39 (¶ 97) ("Today all of the nationwide operators offer some version of a national rate pricing plan in which customers can purchase a bucket of minutes to use on a nationwide or nearly nationwide network without incurring roaming or long-distance charges.").

Contrary to Petitioner's suggestions, customer satisfaction in the wireless industry is high and continually improving. According to the most recent report by the Federal Communications Commission ("FCC" or "Commission"), the percent of wireless subscribers who complained about their service in the fourth quarter of 2005 was 0.0024%, or 24 subscribers per million. *See* Press Release, CTIA, Largent Hails 28% Drop in Wireless Complaints (Feb. 17, 2006), *available at* http://www.ctia.org/news_media/press body.cfm?record_id =1582 (citing News Release, FCC, Quarterly Report on Informal Consumer Inquiries and Complaints Released (Feb. 16, 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/ DOC-263829A1. pdf ("FCC Consumer Report")). Consumer complaints about wireless service fell by 28% between the third and fourth quarters of 2005. *See FCC Consumer Report* ("Wireless complaints decreased from 6,873 in the 3rd quarter to 4,956 in the 4th quarter.").

2. Minnesota Seeks Unlawfully to Regulate Rates Under the Guise of "Consumer Protection."

Against this backdrop of deregulation and burgeoning competition, the Minnesota Legislature enacted a statute that explicitly targets wireless rates and rate structures. Article 5 was signed by the Governor on May 29, 2004.

Respondents provide wireless telecommunications service to subscribers in Minnesota and throughout the United States pursuant to standardized customer service agreements. These agreements typically include provisions that address future changes in terms. They permit carriers to modify prices and other contract terms upon written, advance notice to subscribers. In the case of materially adverse modifications, the subscriber has the right to reject the change and cancel the contract without any early termination fee. The service agreements thus protect subscribers from materially adverse modifications while at the same time providing wireless carriers flexibility to change rates when necessary, allowing them to cover changes in their cost structure and to respond to other market factors.[1]

Article 5 overrides the rate flexibility contained in these contracts and severely constrains wireless carriers' ability to make "substantive changes" to their customers' wireless service contracts pursuant to the change-in-terms provisions contained in those contracts. Subdivision 1 of Article 5 defines the restricted "substantive changes," making clear that the object of the statute is to regulate wireless rates and rate structures:

> Subd. 1(d). "Substantive change" means a modification to, or addition or deletion of, a term or

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1. For example, Verizon Wireless uses a standard contract that provides customers the right to advance notice of contract changes and gives customers 60 days from receipt of the first bill including such changes to terminate their service, free of penalty, if the change would have a material adverse effect on the customer. *See* Verizon Customer Agreement, *available at* http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp (last visited May 11, 2006). In addition, the Consumer Code for Wireless Service, to which all Respondents voluntarily adhere, gives consumers the right to terminate service, without any early termination fee, in response to a material change in contract terms. *See* CTIA Consumer Code for Wireless Service, *available at* http://files.ctia.org/pdf/The_Code.pdf (last visited May 8, 2006).

> condition in a contract that *could result in an increase in the charge to the customer* under that contract or that *could result in an extension of the term* of that contract.

Art. 5, § 1, subdiv. 1(d) (emphases added). Subdivisions 3 and 4 of Article 5 then prescribe the narrow circumstances in which a wireless carrier may make a "substantive change" – that is, alter its rates pursuant to the change-in-terms provision contained in standard wireless service agreements – either at its own initiative or in response to requests for changes by subscribers, respectively.

In particular, subdivision 3 governs "Provider-initiated substantive change[s]" and states that wireless carriers

> must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer *60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization* which is recorded by the provider and maintained for the duration of the contract period. *If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.*

Id., subdiv. 3 (emphases added). By prohibiting any rate increase absent affirmative customer opt-in, Article 5 effectively freezes rates in contravention of federal law.

B. Proceedings Below

On June 16, 2004, two weeks before Article 5 was scheduled to take effect, Respondents filed suit in the United States District Court for the District of Minnesota seeking a declaratory judgment that Article 5 is invalid under Section 332 and

numerous provisions of the U.S. Constitution. On the grounds that Article 5 was expressly preempted by Section 332, invalid under principles of conflict and implied preemption, and that it was unconstitutionally vague, Respondents requested both preliminary and permanent injunctive relief to prevent the Attorney General of Minnesota from enforcing Article 5.

On June 29, 2004, the District Court entered a Temporary Restraining Order ("TRO") preventing enforcement of Article 5. Pet. App. 33a-44a. On September 3, 2004, the District Court substantially reversed itself, finding that the carriers were not likely to succeed on their claim of preemption under Section 332. Pet. App. 16a-32a. The District Court thus entered an order dissolving the TRO and issued a limited preliminary injunction barring enforcement of the statute only to the extent that its 60-day notice and opt-in requirements directly interfered with wireless providers' ability to recover regulatory and other fees authorized by federal law.

The carriers immediately appealed the denial of the preliminary injunction to the Eighth Circuit. On October 14, 2004, the Court of Appeals entered a stay pending appeal of the District Court's order.[2] In the Eighth Circuit, the FCC filed an amicus brief in support of the wireless carriers, setting forth its view that "Article 5 imposes a 60-day freeze on the implementation of virtually all rate increases" and that the imposition of such limits as to "when and under what conditions a carrier may raise its prices . . . is impermissible under section 332(c)(3)(A)." Amicus Curiae Br. of the FCC at 18, 21, *Cellco P'ship v. Hatch*, 431 F.3d 1077 (8th Cir. 2004) (No. 04-3198).

On December 9, 2005, the Eighth Circuit reversed the decision of the District Court. Pet. App. 3a. The Court of Appeals

2. The District Court stayed its order only until October 15, 2004, or such time as the Court of Appeals acted to stay the order pending appeal, whichever came first. *Cellco P'ship v. Hatch*, No. 04-2981 (D. Minn. Sept. 10, 2004) (Tunheim, J.) (order granting stay pending appeal).

held that Article 5 is expressly preempted by Section 332. The Court began its analysis with the text of Section 332(c)(3)(A), inquiring "whether [Article 5] regulates 'rates charged' by providers." Pet. App. 5a. The Court considered the purpose, legislative history, and prior administrative interpretations of the federal statute. Pet. App. 5a-9a. It explained that the FCC, the expert agency charged with implementation of the Communications Act, has read Section 332(c)(3)(A) to prohibit: (i) state schemes requiring prior approval of new rates and delaying implementation of those rates; (ii) not just regulation of rates but also rate structures and rate elements; and (iii) claims under generally applicable state consumer protection, tort, or contract laws when those claims go to the reasonableness of rates. Pet. App. 6a-8a. The Court of Appeals "agree[d] with the FCC that 'fixing rates of . . . providers' is rate regulation." Pet. App. 9a (second alteration in original) (quoting *Petition of Pittencrief Communications, Inc.*, 13 FCC Rcd. 1735, 1745 (¶ 20) (1997)).

Article 5, the Court of Appeals found, "fixes" wireless rates in at least three ways. Pet. App. 9a & 10a. Specifically, the Court determined that: (i) the statute's 60-day waiting period for increases in wireless rates freezes rates for at least that period of time; (ii) even accepting the State's argument that the 60-day period was not mandatory, the approval mechanism for rate increases requiring that customers opt in fixes rates for those customers who decline to opt in, for the entire term of their existing wireless service agreements; and (iii) even if some customers agreed to a price increase, contrary to all intuition, the rate would be frozen until that assent was manifested. Pet. App. 9a-10a. The Court concluded that a "waiting period on any proposed rate changes, whether it be for 60 days or some shorter period pending a customer's decision to 'opt in,' has a clear and direct effect on rates." Pet. App. 12a.

The Court of Appeals rejected as "overbroad" and unpersuasive the State's attempt to recharacterize the statute as a consumer protection measure based on contract law. Pet. App. 10a-11a. The Court reasoned that "[t]o avoid subsuming the regulation of rates within the governance of 'terms and conditions,' the meaning of 'consumer protection' in this context must exclude regulatory measures, such as Article 5, that directly impact the rates charged by providers." Pet. App. 11a. The Court also observed that the statute "goes beyond traditional requirements of contract law, . . . effectively void[ing] the terms of contracts currently used by providers in one industry, and substitut[ing] by statute a different contractual arrangement." Pet. App. 11a. For all these reasons, the Court held that "subdivision 3 effectively regulates rates, and is preempted by § 332(c)(3)(A)." Pet. App. 12a.

The Court of Appeals then applied settled Minnesota severance law, found that subdivision 3 could not be severed from the rest of Article 5, and thus declared Article 5 void in its entirety. Pet. App. 12a-15a.

Petitioner filed a Petition for Writ of Certiorari on March 9, 2006. Respondents respectfully submit this Opposition.

REASONS FOR DENYING THE PETITION

I. This Case Satisfies None of the Criteria for Review by This Court.

A. No Split of Authority Is Even Alleged on the Concededly Novel Issue Presented.

The Petition itself expressly states that "[t]his case presents *the first time* a court of appeals has examined whether a state [wireless "consumer protection"] statute . . . is preempted by 47 U.S.C. § 332(c)(3)(A)." Pet. 7 (emphasis added). As Section 332(c)(3)(A) makes clear, any state law that regulates rates, no matter the "consumer protection" label affixed to it, is preempted, and Article 5 is just such a law. *See infra* pp. 21-30.

Nonetheless, the interaction of Section 332(c)(3)(A) and state statutes that purport to protect consumers by interfering with carriers' rates and rates structures is, as Petitioner himself candidly explains, a developing area of telecommunications law. This is the first federal appellate court decision in this area of preemption, and it addressed the legality of the first state statute of its type in the country.

Because this is a matter of first impression in the courts of appeals, Petitioner does not – indeed, cannot – allege any conflict between the Eighth Circuit's decision and any opinion of this Court or *any other* court. The Eighth Circuit's interpretation of Section 332(c)(3)(A) itself is in the heartland of that statute's plain meaning and purpose and is based on a consistent set of FCC decisions interpreting that statute. The Eighth Circuit's interpretation of Section 332(c)(3)(A) does not conflict with the decision of any state or federal court. Nor is there any conflict between the Eighth Circuit's application of Section 332 to the particular kind of state action before it and the decision of any other court. In short, there is simply no split in authority whatsoever that would warrant this Court's review.

The full scope of the prohibition against state "regulat[ion]" of "the rates charged by" wireless service providers is an issue now developing in the lower federal courts and at the FCC. Presently pending in the Eleventh Circuit are two challenges to a Commission Order finding that state regulations that require or prohibit "line-items" on wireless bills are preempted under Section 332(c)(3)(A), thus presenting questions related to the breadth of the statutory phrase "rates charged." *See Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, No. 05-11682-DD (11th Cir. filed Jan. 12, 2006) (petition for review of declaratory ruling portion of *Truth-in-Billing and Billing Format*, 20 FCC Rcd. 6448, 6458 (¶ 23) (2005)); *Vt. Pub. Serv. Bd. v. FCC*, No. 05-12601-DD (11th Cir. filed Jan. 12, 2006) (same)).

And, as the Court of Appeals observed, "the FCC is in the midst of a rulemaking" to define federal-state jurisdictional boundaries with respect to wireless billing practices generally. Pet. App. 7a n.2 (citing *Truth-in-Billing and Billing Format*, 20 FCC Rcd. at 6476 (¶ 53) (tentatively concluding that "states only may enforce their own generally applicable contractual and consumer protection laws, albeit as they apply to carriers' billing practices")). In addition, the Commission currently has before it two petitions for declaratory rulings that wireless early termination fees are "rates charged" within the meaning of the statute and that state class action suits challenging the reasonableness of those fees "regulate" rates. *See Petition of the CTIA for an Expedited Declaratory Ruling*, FCC Docket No. 05-194 (filed Mar. 15, 2005); *Petition of SunCom Operating Company LLC for Declaratory Ruling*, FCC Docket No. 05-193 (filed Feb. 22, 2005).

Indeed, Petitioner dwells at length on the allegedly similar wireless consumer protection statutes recently enacted in thirteen States, a number that Petitioner expects will grow as more States join in the effort to test the bounds of Section 332(c)(3)(A). *See* Pet. 16-18 & nn. 7-8.[3] This only proves, however, that it would be premature for this Court to take up these issues in this case.

The various proceedings described above, along with any that may arise in the future, will present varied factual and legal contexts to which Section 332(c)(3)(A) can be applied, and thus can be expected to contribute to an evolving understanding of the meaning and proper application of the statute. Thus, the larger questions regarding the full breadth of Section 332(c)(3)(A)'s preemptive scope are not appropriate for review in the instant controversy.

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3. Whether or not these state statutes implicate Section 332(c)(3)(A), they do not employ the 60-day notice and opt-in mechanisms to prevent rate increases contained in Article 5.

For these reasons, it is clear that the Petition presents no split in authority of any type, that it involves the first federal appellate court decision on the first state wireless "consumer protection" statute in the nation, and that the larger issue of the preemptive scope of Section 332(c)(3)(A) is now being actively considered at the FCC, in pending litigation, and possibly in the context of new state efforts to regulate wireless rates.

B. This Is Not a Case of Extraordinary National Importance.

In the absence of any alleged or actual conflict, Petitioner attempts to argue that this is a case of great significance not just to Minnesota but to all States and wireless customers nationwide, setting forth a parade of horribles that supposedly will flow from the Eighth Circuit's decision. *See* Pet. 9-12. This argument is entirely speculative and, in any case, without merit. In light of the holding of the Eighth Circuit – that Article 5 is preempted by Section 332(c)(3)(A) because it regulates wireless rates – it is plain that this case presents no issue of extraordinary national importance that would justify this Court's review.

First, the holding of the Eighth Circuit is far from "overly expansive." Pet. 8. To the contrary, the Court of Appeals' decision falls squarely within the inner core of the plain language, purpose, and relevant FCC interpretations of the statute. With respect to the meaning of Section 332(c)(3)(A), the Court of Appeals read the ban on "any" state authority "to regulate . . . the rates charged" by wireless service providers, 47 U.S.C. § 332(c)(3)(A), to cover state action that "fixes" or "freezes" rates. Pet. App. 9a-10a. This interpretation was grounded not only in the text of the statute, but also in FCC precedent construing the statute as preventing States from "'fixing rates of . . . providers,'" Pet. App. 9a (alteration in original) (quoting *Pittencrief*, 13 FCC Rcd. at 1745 (¶ 20)), and finding that prior state review of wireless rates occasioning delays of 30 days before the new rates could take effect was

prohibited rate regulation, *see* Pet. App. 7a (explaining *Petition of Hawaii Public Utility Commission*, 10 FCC Rcd. 7872, 7882 (¶ 46) (1995)). It was also based on the Court's consideration of the legislative history and purpose of Section 332. *See* Pet. App. 5a-9a.

If the ban on state rate regulation means anything, it encompasses state action that fixes or freezes rates. While there may be cases that test the outer boundaries of Section 332(c)(3)(A)'s scope, this is not one. With respect to the application of Section 332(c)(3)(A) to the state statute before it, the Court carefully examined subdivision 3 and determined that it operated, in *several* ways, to freeze rates by its 60-day notice period and opt-in mechanism for price increases. As far as Respondents are aware, no other state wireless "consumer protection" statute, and certainly none of those cited by Petitioner, Pet. 16-17 & nn. 7-8, bears these features.

Thus, Petitioner's assertion that the decision below "strips the states of their sovereign right to protect wireless consumers," Pet. 9, is simply incorrect.[4] The decision simply enforces, as applied to Article 5, Congress' command that States not engage in regulation of wireless rates.

Second, Petitioner's claims as to the nationwide effect of the Eighth Circuit's decision are purely conjectural. As an initial matter, the decision is of course binding only on the courts in that judicial circuit and, as noted above, Respondents are not aware of any state wireless statute that employs the procedural mechanisms found in Article 5. Neither Petitioner nor Respondents can predict how other circuits will analyze other state laws under Section 332(c)(3)(A) or how they will treat the Eighth Circuit's decision. Accordingly, there is no basis for

4. Petitioner's concern regarding the adequacy of notice to consumers of contractual changes, Pet. 11, is misplaced. Carriers already provide subscribers with advance notice of contractual modifications, as required by the contracts themselves and industry standards. *See supra* pp. 5-6 & n.1.

Petitioner's suggestion that the decision below somehow automatically deprives consumers and state officers nationwide of any rights they may have under existing law.

Third, the argument is founded on unfair and inaccurate assertions about the business practices of wireless carriers. Throughout his filing, Petitioner persists in the notion, soundly rejected below, that wireless carriers "unilaterally" change the terms of customer contracts. *See* Pet. 3-4, 12-13 & n.5. As we have explained, and as the Court of Appeals agreed, the contracts at issue expressly provide for advance notice to the subscriber of rate increases and allow the subscriber to reject the change, if it is a material adverse one, within a reasonable period of time without triggering any early termination fee. *See* Pet. App. 11a ("The existing contracts . . . permit the providers to effect rate increases upon reasonable notice to the customer, whose continued use of the service binds him to the new rate unless he affirmatively declines to accept the changes."); *see supra* pp. 5-6 & n.1. There is nothing "illusory" about these contracts. *See* Pet. App. 11a (noting that "opt-out" contracts "are generally accepted as legal and binding"). It is Minnesota that is trying to alter the terms of wireless contracts, not Respondents. *See* Pet. App. 11a ("This statute effectively *voids* the terms of contracts currently used by providers. . . ." (emphasis added)).

Despite Petitioner's implication that wireless carriers are bad actors in the marketplace, consumer satisfaction with wireless service is extraordinarily high and continually rising. Nationwide, wireless billing and rate complaints dropped 24% (from 3,259 to 2,480) between the third and fourth quarters of 2005, *see* FCC Consumer Report at 9 (providing data for fourth quarter); News Release, FCC, Quarterly Report on Informal Consumer Inquiries and Complaints Released, at 9 (Nov. 4, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262020A1.pdf (providing data for third

quarter), while over the same period the number of wireless subscribers increased by 6 million. *See* Letter from Christopher Guttman-McCabe, Vice-President, Regulatory Affairs, CTIA – The Wireless Association, to Marlene H. Dortch, Secretary, FCC, at 4 & n.11 (Mar. 13, 2006) (on file with FCC, CC Docket No. 98-170). Complaints as a percentage of subscribers are even more revealing. Billing complaints fell from 0.0016% to 0.0012%, an improvement of more than 26%; in fact, for the 4th quarter of 2005, wireless consumers had just 3 billing complaints per million subscribers per month. *Id.* at 4. The wireless sector is highly competitive, and carriers thus have every incentive to – and do – strive to provide their customers with the best possible prices and service.[5]

Petitioner's related allegation that the Eighth Circuit's decision leaves wireless subscribers without any "meaningful remedy," Pet. 20, is simply wrong. Wireless customers who feel they have been aggrieved by their carrier have multiple avenues of relief, all of which the Eighth Circuit's decision leaves intact. *First and foremost*, consumers can switch carriers. As competition in the wireless industry has exploded, so have the options for wireless users. Customers are free to choose between an ever-increasing number of wireless contracts and service plans provided by many different local, regional, and national wireless providers. *See 2005 Competition Report*, 4-5 (¶ 4) ("Consumers continue to pressure carriers to compete on price and other terms and conditions of service by freely switching providers in response to differences in the cost and quality of service."). Consumer freedom to change carriers, and thereby to intensify competitive forces in the industry, has only been heightened by the FCC's recent implementation of number portability. *See Implementation of Section 6002(b) of the*

5. In any event, allegations of generalized consumer dissatisfaction are irrelevant to the legal questions presented here.

Omnibus Budget Reconciliation Act of 1993, 19 FCC Rcd. 20597, 20601 (¶ 4) (2004) ("[T]he implementation of local number portability ('LNP') beginning in November 2003 has lowered consumer switching costs by enabling wireless subscribers to keep their phone numbers when changing wireless providers."); *see also 2005 Competition Report*, 5 (¶ 4) ("LNP has put added pressure on carriers to improve service quality in order to retain existing customers. . . .").

Second, if any wireless carrier violates the terms of an existing contract, fails to disclose material terms, or engages in an unfair business practice, subscribers have recourse to traditional remedies under generally applicable state contract, tort, and consumer fraud laws (so long as those remedies do not involve an assessment of the reasonableness of rates). *See Wireless Consumers Alliance, Inc.*, 15 FCC Rcd. 17021, 17022 (¶ 2) (2000).

Third, wireless carriers' rates and rate structures, while off limits to state regulators, are subject to federal review under the "unjust or unreasonable" standard of 47 U.S.C. § 201(b) and the non-discrimination requirement of 47 U.S.C. § 202(a).[6] Wireless customers are protected by these laws as well as the FCC's accompanying complaint procedures, which provide for convenient reporting of complaints online, or by mail, telephone, or fax. *See* FCC, Filing A Complaint With The FCC Is Easy, http://www.fcc.gov/cgb/complaints.html (last visited May 9, 2006). The FCC also offers customers informal mediation and resolution of problems. *See* FCC, Consumer Inquiries & Complaints Division, http://www.fcc.gov/cgb/cgb_offices.html#CICD (last visited May 9, 2006).

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6. The FCC has previously found that wireless rates are presumptively reasonable and non-discriminatory because wireless carriers lack market power. *See Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd. 1411, 1419, 1478 (¶¶ 16-17, 173-75) (1994).

If Minnesota (or any other State) believes, despite the availability of these various remedies, that rate regulation of wireless services is necessary to protect its citizen-consumers, it can seek permission from the FCC to take such action. *See* 47 U.S.C. § 332(c)(3)(A) (providing that "a State may petition the Commission for authority to regulate the rates for any commercial mobile radio service" and Commission "shall grant such petition" upon the State's demonstration of certain factors, such as market failure). Notably, Minnesota has never done so.

For these reasons, it is clear that this is not a case of exceptional national importance that might warrant the exercise of this Court's certiorari jurisdiction notwithstanding the absence of any alleged or actual conflict.

II. Even if the Traditional Criteria for Granting Certiorari Were Satisfied, This Case Suffers from Fatal Vehicular Flaws.

A. The State Statute at Issue Will Soon Expire and Also May Be Superseded by Amending Legislation.

Even if Petitioner had satisfied any of the traditional factors for granting certiorari, this case is a fatally flawed vehicle for any meaningful judicial review. Not only is the ultimate resolution of this case dependent on the meaning of Article 5, it is undisputed that this statute, which rests at the heart of the dispute here, is scheduled to *expire* next year. Art. 5, § 1, subdiv. 5 ("This section expires August 1, 2007."). Thus, any relief provided by this Court would be at best short-lived, as the very statute whose invalidation is challenged here will cease to exist within months of any decision rendered by this Court. And if the statute expires before the Court can issue an opinion, that would moot the case entirely. *See, e.g., Burke v. Barnes*, 479 U.S. 361, 363 (1987) (holding, in context of "challenge to the validity of a statute that has expired," that "any issues . . . were

mooted when that bill expired by its own terms"). The statute's impending expiration dooms the certiorari request.

In addition, Article 5 may be legislatively superseded. In response to the Eighth Circuit's opinion, the original supporters of Article 5 in the Minnesota Legislature recently proposed new legislation in an apparent attempt to remedy the numerous infirmities that plagued the original statute. On March 1, 2006, "[a] bill for an act relating to telecommunications; providing consumer protections for wireless customers; amending Minnesota Statutes 2004, section 325F.695" was introduced in the Minnesota House of Representatives. App 1a-4a (H.F. 2983, 84th Leg. Sess. (Minn. 2006)). On March 13, 2006, a companion bill was introduced in the Minnesota Senate. App. 5a-8a (S.F. 2988, 84th Leg. Sess. (Minn. 2006)). These bills, whatever their ultimate validity, both seek to eliminate the particular features of Article 5 that were at issue in the Eighth Circuit. Among other changes, the proposed legislation would strike out the 60-day advance notice and opt-in provisions. App. 3a (H.F. 2983, § 1, subdiv. 3); App. 7a (S.F. 2988, § 1, subdiv. 3).[7] If these bills are enacted into law, the resultant legislation will moot this case. *See, e.g., Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (holding that a "substantial amendment" of a challenged regulation mooted controversy over its validity); *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam) ("[T]he recent amendatory action of the Colorado Legislature [to the challenged statute] has surely operated to render this case moot.").

Given that Article 5 will no longer exist in less than 15 months and that the Minnesota Legislature has already gone back to the drawing board in an effort to fix the legal problems

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7. Further, the new bills attempt to remedy the vagueness problems of Article 5. App. 2a (H.F. 2983, § 1, subdiv. 1(b) (d), (e)); App. 6a (S.F. 2988, § 1, subdiv. 1(b), (d), (e)).

associated with Article 5, any review of the decision below by this Court is both unwarranted and unnecessary.

B. Due to the Procedural Posture of This Case, a Decision by This Court Will Not Resolve the Validity of Article 5.

This is a flawed vehicle for review of any questions worthy of certiorari for yet another reason: Petitioner's success on the question whether Article 5 constitutes rate regulation preempted by Section 332(c)(3)(A) will not necessarily save the statute from invalidation.

This case arises out of a motion for preliminary relief, which was predicated not only on the ground of express preemption under Section 332(c)(3)(A) but also on conflict and implied preemption, as well as unconstitutional vagueness. Given its resolution of the preemption issue, the Court of Appeals found it unnecessary to reach the vagueness claim. Pet. App. 14a-15a. Moreover, Respondents initially filed suit on several additional grounds, including the Due Process Clause, the Contracts Clause, the Commerce Clause, and Section 1983, none of which were litigated in the proceedings that have brought the parties to this Court.

Thus, in the unlikely event Petitioner were to prevail in this Court on the merits of his claim under Section 332, his victory could be purely theoretical. Litigation over the validity of Article 5 (assuming the case is not mooted by the statue's expiration or amendment) would continue on the remaining grounds in the lower courts, which could result in the invalidation of Article 5 for reasons wholly independent of preemption.

The numerous vehicular flaws discussed above preclude any meaningful review of the questions presented by Petitioner, even if those questions themselves satisfied this Court's standards for the grant of certiorari.

III. In Any Event, the Court of Appeals Correctly Concluded that Article 5 Regulates Rates, Rendering the Entire Minnesota Statute Preempted by Federal Law.

Bared of its exaggerated rhetoric, Petitioner's argument amounts to a claim that the Eighth Circuit erred in finding that Article 5 was preempted by Section 332(c)(3)(A). In this regard, Petitioner focuses not so much on the Court of Appeals' interpretation of Section 332 but on its findings with respect to the meaning and operation of Article 5. But this Court does not sit to review mere error below. Moreover, the proper application of Section 332 to the particular state statute at issue, or the details of that statute's construction and operation, are not the types of questions that typically concern this Court. In any event, the Court of Appeals' entire analysis was correct.

A. The Court of Appeals Correctly Held That Article 5 by its Terms Regulates Rates in Violation of Section 332(c)(3)(A).

The Eighth Circuit correctly interpreted Article 5 when it concluded that Minnesota's attempt to regulate wireless rates under the guise of "consumer protection" is rate regulation prohibited by Section 332(c)(3)(A).

Section 332(c)(3)(A) of the Communications Act, entitled "State preemption," provides that "no State or local government shall have any authority to regulate . . . the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). As discussed above, the Eighth Circuit took a careful and cautious approach to the statute, thoroughly analyzing its text, purpose, legislative history, and relevant agency precedents. As a result of this analysis, the Court of Appeals, basing its interpretation on two FCC decisions, correctly found that the proscription against "any authority" of the States "to regulate . . . the

rates charged" by wireless service providers, 47 U.S.C. § 332(c)(3)(A), includes state attempts to "fix" or "freeze" rates for any period of time. Pet. App. 9a-10a.

The Court then applied this federal rule of law to the particular state action before it, Article 5. Article 5 flatly prohibits any change that "could result in an increase in the charge to the customer" or "[a] price increase," Art. 5, § 1, subdiv. 1(d), without the provision of 60-day advance notice of the change and unless and until the individual customer affirmatively opts in to the increase in writing, *id.* subdiv. 3. The statute further mandates that, for as long as opt-in remains outstanding, "the original contract terms shall apply." *Id.*

Based on its reading of Article 5's unmistakable terms and its obvious effect, the Eighth Circuit rightly concluded that, whatever the duration of the various types of freezes effectuated by the statute, it has a "clear and direct effect on rates." Pet. App. 12a. In particular, the Court reviewed subdivision 3 and determined that: (i) the 60-day waiting period for increases in wireless rates freezes rates for at least that period of time; (ii) even accepting the State's argument that the 60-day period is not mandatory,[8] the opt-in mechanism still fixes rates, for the entire term of existing wireless service agreements, for those customers who decline to opt in; and (iii) even if some customers would agree to a price increase, contrary to all intuition,[9] the

8. The Court of Appeals noted that this position "strikes us as inconsistent with the plain meaning of the text of the statute," Pet. App. 9a, but assumed it *arguendo*.

9. The Court of Appeals observed that the proposition "that all consumers would willingly accept rate hikes when proposed, and thus 'opt in' before the expiration of the 60-day period" was "contrary to our experience with human nature." Pet. App. 10a. As Respondents argued below, it is difficult to imagine a scenario in which customers would take the time and effort to execute and transmit to a service provider an agreement in writing acceding to higher prices.

rate would be frozen until that assent was manifested. Pet. App. 9a-10a. Thus, the Court of Appeals did not just find that the statute freezes rates on Respondents' theory of Article 5, but went on to explain that the statute freezes rates even on Petitioner's theory of the statute and his counterintuitive assertions regarding consumer behavior.

In light of the foregoing, the Court of Appeals concluded that "[t]he statute thus requires providers to maintain rates different from those that would be charged if the providers were left to follow the terms of their existing contracts, which typically allow an adjustment of rates after reasonable notice of fewer than 60 days." Pet. App. 10a. Because "subdivision 3 effectively regulates rates," the Court of Appeals found it to be preempted by Section 332(c)(3)(A). Pet. App. 12a.

While Petitioner contests the correctness of these conclusions, his efforts are, as explained below, unavailing. Once the Eighth Circuit correctly concluded that Article 5 regulates wireless rates, the answer to the question of federal preemption was plain.

1. Petitioner Advances an Unduly Narrow Understanding of Rate Regulation.

Petitioner's contention that the Eighth Circuit erred in its understanding of the meaning of Section 332(c)(3)(A) fundamentally misapprehends the nature of rates and rate regulation. Petitioner's argument that Article 5 is not rate regulation under Section 332(c)(3)(A) because it does not require the filing of rates with a state regulator or impose an administrative review process, Pet. 25-27, is simply wrong. Petitioner reasons that, in 1993, Congress' understanding of rate regulation was limited to the state tariffing procedures on which the filed rate doctrine is based. Pet. 25 ("Importantly, it was well-established by 1993 that a rate regulated entity generally could charge only the rate on file with the relevant federal or

state agency."). He cites the FCC's 1995 rejection of Connecticut's request to continue its traditional regulation of wireless rates as confirmation of this limited understanding of rate regulation. Pet. 26.

This lacks merit. As a threshold matter, the FCC's 1995 rejection of a request to impose tariff requirements on wireless providers is not determinative of the scope of Congress' preemptive intent in 1993. In the Connecticut case, the FCC was not expounding on the breadth of Section 332(c)(3)(A) but reviewing a State's request to continue with one particular type of rate regulation, as Petitioner himself acknowledged. *See* Pet. 26. If Congress intended only to eliminate state wireless tariff requirements, it could have been far more precise in drafting its preemption provision and said so; instead, it expressly foreclosed the exercise of "*any* [state] authority" to regulate rates. 47 U.S.C. § 332(c)(3)(A) (emphasis added).

Petitioner's restrictive definition of rate regulation conflicts with years of judicial and agency determinations that various types of state action, not just tariff requirements, run afoul of Section 332(c)(3)(A). *See, e.g., Truth-in-Billing and Billing Format*, 20 FCC Rcd. at 6463 (¶ 30) n.84 (noting that "the terms 'state regulation' and 'state regulatory action' have broad application in the context of section 332"); *Petition of Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd. 19898, 19906-07 (¶ 20) (1999) (finding that state court litigation challenging carrier practices of "rounding up" to the nearest minute and charging for incoming calls were prohibited rate regulation); *Wireless Consumers Alliance*, 15 FCC Rcd. at 17027 (¶ 12) (noting that "judicial action can constitute state regulatory action for purposes of Section 332" (citing decisions of this Court)); *see also Bastien v. AT&T Wireless Servs.*, 205 F.3d 983, 986 (7th Cir. 2000) (concluding state complaints could be preempted); *AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003) (accepting premise that state judicial action can constitute

impermissible rate regulation); *Gilmore v. Sw. Bell Mobile Sys.*, 156 F. Supp. 2d 916, 925 (N.D. Ill. 2001) (deeming state law claim based on unjust enrichment preempted under Section 332(c)(3)(A)). It is thus clear that state rate regulation is not limited to the traditional tariff review process at state public utility commissions; state "oversight" of rates can come in many forms other than the requirement that carriers "file their rates with the State." Pet. 25, 26. Indeed, this much was accepted without objection below, and Petitioner makes this argument here for the first time.

Petitioner also emphasizes that Congress stated that it was not preempting state regulation of "the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A). But Congress did preempt rate regulation, and, as we have shown, a rate freeze is rate regulation. By declining to preempt *other* terms and conditions of wireless service, Congress did not authorize States to freeze rates.

Petitioner further argues that the Eighth Circuit erred in failing expressly to carve out the State's authority to regulate contract term length, which Petitioner argues is distinct from rate regulation and therefore not preempted. Pet. 22-24. This argument need not long detain the Court, and is certainly no basis for certiorari. *First*, for the Court of Appeals to have done what Petitioner urges would have required it to "blue pencil" a portion of a definitional section that it already found could not independently stand in light of the infirmities of subdivision 3.[10] *Second*, if Petitioner thought the Court of Appeals neglected

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10. Petitioner cloaks an allegation of error with respect to severability in the mantle of an alleged misapplication of federal law. To preserve the contract extension portion of the statute, the Eighth Circuit would have had to selectively edit subdivision 1's definition of "substantive change" as follows:

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to address the term extension piece of subdivision 3, he could have sought panel rehearing on this issue. *See* Fed. R. App. P. 40 (providing for petitions for panel rehearing with respect to "point[s] of law or fact that the petitioner believes the court has overlooked or misapprehended"); *see also* 8th Cir. R. 40A. But he did not. Petitioner should not ask this Court to exercise its certiorari jurisdiction to engage in this sort of niggling review of the opinion below.

In any event, this argument is foreclosed on the merits by this Court's recognition that "[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached." *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998). The length of a contract term is intimately connected to the price charged, and thus state regulation of contract term length, which would obviously affect the price charged, is rate regulation.

2. Petitioner's Claim of Error Is Predicated on Mere Disagreement with the Court of Appeals over the Meaning and Operation of Article 5.

Because Article 5's preemption was a foregone conclusion once the Eighth Circuit determined the statute effectively

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(Cont'd)

> Subd. 1(d). "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that ~~could result in an increase in the charge to the customer under that contract or that~~ could result in an extension of the term of that contract.

In light of the complete invalidation of subdivision 3, such an exercise would have required the Court of Appeals to cobble together its own version of a wireless consumer protection statute, usurping the Minnesota Legislature's role. As explained above, two bills amending Article 5 in order to try and cure its legal defects already have been introduced in the Minnesota Legislature.

regulated wireless rates, Petitioner's assertion of error is at bottom nothing more than a request that this Court review and correct the Eighth Circuit's alleged misinterpretation of the language and workings of Article 5. Error correction is not a task worthy of this Court's certiorari jurisdiction. Furthermore, the claim of error lacks merit. As the Court of Appeals concluded, the inescapable textual mandate and practical effect of Article 5's 60-day notice provision and opt-in requirement is to restrict wireless carriers' ability to increase prices pursuant to the express provisions of customer service agreements.

As he unsuccessfully argued below, Petitioner once again asserts that the 60-day notice requirement does not freeze rates for that period of time. To do so he must deny that "60 days," Art. 5, § 1, subdiv. 3, means 60 days. He contends that the "Act simply requires notice '60 days before the change is proposed to take effect,' and provides that the change may take effect if the customer 'opts in' before the 'proposed effective date.'" Pet. 27 (quoting Art. 5, § 1, subdiv. 3). But nothing in Article 5 provides that the change may take effect, even where the customer agrees to it, until after the 60 days has run.

As the Eighth Circuit explained, this argument is "inconsistent with the plain meaning of the text of the statute." Pet. App. 9a. Under the statute, the proposed effective date is the sole benchmark for computing the date that notice must be given, and accurately calculating the required notice necessarily depends upon the effective date being fixed in time. The statute nowhere suggests that the effective date can be moved up in time if the customer assents. In the words of the Court of Appeals, "[a] proposed change thus must include a proposed effective date, and modification of the 'effective date' is not contemplated by the statute." Pet. App. 10a.

Moreover, the Eighth Circuit found that subdivision 3 freezes rates even assuming that the 60-day period is merely permissive:

> [E]ven accepting the State's interpretation, under which rates may be changed as soon as a customer manifests assent, the statute still fixes rates for at least some customers to some degree. If even one customer declines to "opt in" to a provider's rate increase, then the proposed rate for that customer's service would be fixed for the term of the existing contract . . . .

Pet. App. 10a. The Eighth Circuit further bullet-proofed its determination that Article 5 regulates rates by finding that, in the unlikely scenario that a customer agrees to a rate change before the 60 days has run, "subdivision 3 indisputably freezes rates . . . at least until the consumer manifests acceptance." Pet. App. 10a. Petitioner fails even to address these two alternative findings of the Court of Appeals.

For all these reasons, the Eighth Circuit correctly concluded that Article 5, given its language and practical effect, regulates rates in violation of Section 332. The Petition provides no reason for this Court to second-guess that well-founded conclusion.

3. Article 5 Is Not Saved from Preemption by Petitioner's Unadorned Assertion That It Is a "Consumer Protection" Statute.

Repeatedly calling Article 5 a "consumer protection" measure, *see* Pet. 9-14, does not bring it within the scope of "other terms and conditions" under Section 332(c)(3)(A). If a state law regulates wireless rates, it is preempted by Section 332, regardless of the label affixed to it. As the Eighth Circuit aptly observed,

> [a]ny measure that benefits consumers, including legislation that restricts rate increases, can be said

> in some sense to serve as a "consumer protection measure," but a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by § 332(c)(3)(A).

Pet. App. 10a-11a.

Nor does Article 5 simply codify contract law. Rather, subdivision 3 "goes beyond traditional requirements of contract law, and thus falls outside the scope of the 'neutral application of state contractual or consumer fraud laws,' which the FCC has said is permissible state regulation of wireless providers." Pet. App. 11a (quoting *Wireless Consumers Alliance*, 15 FCC Rcd. at 17025-26 (¶ 8)). Minnesota does not seek the power to enforce contracts as written, because the contracts as written contain valid change-in-terms provisions that expressly permit the conduct that Petitioner alleges is abusive. *See* Pet. App. 11a; *supra* pp. 5-6 & n.1. Instead, Minnesota seeks legislatively to change basic features of the standard contracts used by the wireless industry.

B. The Eighth Circuit Properly Applied Established Principles of Minnesota Law to Conclude That Severance Was Inappropriate.

Petitioner also asks this Court to exercise its certiorari jurisdiction in order that it, rather than the Eighth Circuit, apply settled Minnesota severance law to Article 5. The severability of Article 5, however, is a question of pure state law. Not only is such an issue inappropriate for review on certiorari, but this Court, if it took up the severance question, would only reach the same conclusion as the Court of Appeals – namely, that subdivision 3 of Article 5 is not severable from the other provisions because they are "connected with and dependent upon subdivision 3." Pet. App. 13a.

In reaching this conclusion, the Court of Appeals conducted a thorough review of Minnesota's severance statute, Minnesota case law, and the legislative history of Article 5. That legislative history revealed, among other things, that subdivision 3 was "the motivating force behind" the entire statute. Pet. App. 13a. Petitioner conclusorily asserts that this severability analysis was in error because other subdivisions "stand on their own," Pet. 29, but he cites no controlling case law or informative legislative history to contradict the lower court's analysis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — MINNESOTA HOUSE OF REPRESENTATIVES, H.F. No. 2983, as introduced - 84th Legislative Session (2005-2006), Posted on Feb. 28, 2006

MINNESOTA HOUSE OF REPRESENTATIVES

H.F. No. 2983, as introduced -
84th Legislative Session (2005-2006)
Posted on Feb. 28, 2006
[*Available at: http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H2983.0.html&session=ls84&print=1*]

A bill for an act relating to telecommunications; providing consumer protections for wireless customers; amending Minnesota Statutes 2004, section 325F.695.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 2004, section 325F.695, is amended to read:

325F.695 CONSUMER PROTECTIONS FOR WIRELESS CUSTOMERS.

Subdivision 1. **Definitions.** The definitions in this subdivision apply to this section.

(a) "Contract" means an oral or written agreement of definite duration between a provider and a customer, detailing the wireless telecommunications services to be provided to the customer and the terms and conditions for provision of those services.

Appendix A

(b) "Customer" means a party to a valid current contract with a provider to receive wireless telecommunication services.

(c) "Wireless telecommunications services" means commercial mobile radio services as defined in Code of Federal Regulations, title 47, part 20.

~~(c)~~ (d) "Provider" means a provider of wireless telecommunications services.

~~(d)~~ (e) "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that ~~could result~~ results in an increase in the charge to the customer under that contract or that ~~could result in an extension of~~ lengthens the term of that contract. "Substantive change" includes a modification in the provider's administration of an existing contract term or condition. A price increase that includes only the actual amount of any increase in ~~taxes or fees~~ a state or federal tax, fee, or surcharge, which the state or federal government authorizes or requires the provider to impose upon the customer, is not a substantive change for purposes of this section.

Subd. 2. **Copy of contract.** A provider must provide each customer with a written copy of the customer's contract between the provider and the customer within 15 days of the effective date of the contract ~~is entered into~~. The provider may meet the requirement to provide a written copy of the contract by providing an electronic copy of the contract at the customer's request. A provider must maintain verification that the customer accepted the terms of the contract for the duration of the contract period.

Appendix A

Subd. 3. **~~Provider-initiated~~ Notice of substantive change.** A provider must notify the customer in writing in advance of any ~~proposed~~ substantive change proposed by the provider in ~~the~~ an existing contract between the provider and the customer. ~~60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.~~ The notification must be sent separately from other mailings and the envelope must be labeled "NOTICE OF PROPOSED CHANGE IN CONTRACT TERMS." The font of the notification must be of sufficient size to be clearly legible and must contain clear and unambiguous language separately detailing each substantive change proposed by the provider and its effective date.

Subd. 4. **~~Customer initiated change~~ Customer may opt out.** ~~If the customer proposes to the provider any change in the terms of an existing contract, the provider must clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change. The customer's proposed change is only effective if the provider agrees to the proposed change and the customer agrees to any resulting changes in the contract. The provider must maintain recorded or electronic verification of the disclosure for the duration of the contract period.~~ A customer who has received a provider's notice required under subdivision 3 may choose

to opt out of and terminate a contract without penalty, provided that the customer notifies the provider in writing of the decision to terminate the contract within 60 days of the effective date of the substantive change contained in the provider's notice. A customer who does not send a provider timely written notice of a decision to opt out of and terminate the contract is considered to have agreed to the proposed substantive change and the contract is considered modified.

~~Subd. 5. Expiration. This section expires August 1, 2007.~~

EFFECTIVE DATE. This section is effective July 1, 2006, and applies to contracts for wireless service entered into on or after May 1, 2006.

APPENDIX B — MINNESOTA HOUSE OF REPRESENTATIVES, S.F. No. 2988, as introduced - 84th Legislative Session (2005-2006), Posted on Mar. 09, 2006

MINNESOTA HOUSE OF REPRESENTATIVES

S.F. No. 2988, as introduced -
84th Legislative Session (2005-2006)
Posted on Mar. 09, 2006
[*Available at: http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S2988.0.html&session=ls84*]

A bill for an act relating to telecommunications; providing consumer protections for wireless customers; amending Minnesota Statutes 2004, section 325F.695.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 2004, section 325F.695, is amended to read:

325F.695 CONSUMER PROTECTIONS FOR WIRELESS CUSTOMERS.

Subdivision 1. **Definitions.** The definitions in this subdivision apply to this section.

(a) "Contract" means an oral or written agreement of definite duration between a provider and a customer, detailing the wireless telecommunications services to be provided to the customer and the terms and conditions for provision of those services.

Appendix B

(b) "Customer" means a party to a valid current contract with a provider to receive wireless telecommunication services.

(c) "Wireless telecommunications services" means commercial mobile radio services as defined in Code of Federal Regulations, title 47, part 20.

~~(c)~~ (d) "Provider" means a provider of wireless telecommunications services.

~~(d)~~ (e) "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that ~~could result~~ results in an increase in the charge to the customer under that contract or that ~~could result in an extension of~~ lengthens the term of that contract. "Substantive change" includes a modification in the provider's administration of an existing contract term or condition. A price increase that includes only the actual amount of any increase in ~~taxes or fees~~ a state or federal tax, fee, or surcharge, which the state or federal government authorizes or requires the provider to impose upon the customer, is not a substantive change for purposes of this section.

Subd. 2. **Copy of contract.** A provider must provide each customer with a written copy of the customer's contract between the provider and the customer within 15 days of the effective date of the contract ~~is entered into~~. The provider may meet the requirement to provide a written copy of the contract by providing an electronic copy of the contract at the customer's request. A provider must maintain verification that the customer accepted the terms of the contract for the duration of the contract period.

Appendix B

Subd. 3. ~~**Provider-initiated**~~ **Notice of substantive change.** A provider must notify the customer in writing in advance of any ~~proposed~~ substantive change proposed by the provider in ~~the~~ an existing contract between the provider and the customer. ~~60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.~~ The notification must be sent separately from other mailings and the envelope must be labeled "NOTICE OF PROPOSED CHANGE IN CONTRACT TERMS." The font of the notification must be of sufficient size to be clearly legible and must contain clear and unambiguous language separately detailing each substantive change proposed by the provider and its effective date.

Subd. 4. ~~**Customer-initiated change**~~ **Customer may opt out.** ~~If the customer proposes to the provider any change in the terms of an existing contract, the provider must clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change. The customer's proposed change is only effective if the provider agrees to the proposed change and the customer agrees to any resulting changes in the contract. The provider must maintain recorded or electronic verification of the disclosure for the duration of the contract period.~~ A customer who has received a provider's notice required under subdivision 3 may choose

to opt out of and terminate a contract without penalty, provided that the customer notifies the provider in writing of the decision to terminate the contract within 60 days of the effective date of the substantive change contained in the provider's notice. A customer who does not send a provider timely written notice of a decision to opt out of and terminate the contract is considered to have agreed to the proposed substantive change and the contract is considered modified.

~~Subd. 5. **Expiration.** This section expires August 1, 2007.~~

EFFECTIVE DATE. This section is effective July 1, 2006, and applies to contracts for wireless service entered into on or after May 1, 2006.

(6)

No. 05-1159

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

MIKE HATCH, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF MINNESOTA
AND NOT AS AN INDIVIDUAL,

Petitioner,

v.

CELLCO PARTNERSHIP D/B/A
VERIZON WIRELESS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of this Court's rules, petitioner Mike Hatch, Attorney General of Minnesota, respectfully submits this supplemental brief to call the Court's attention to a newly decided Eleventh Circuit Court of Appeals case that addresses the same critical federal preemption question as that raised by this petition. A copy of the Eleventh Circuit case, *National Association of State Utility Consumer Advocates v. Federal Communications Commission*, 457 F.3d 1238 (11th Cir. 2006) ("*NASUCA*"), decided July 31, 2006, is reproduced in the Appendix to this Supplemental Brief.

The Eleventh Circuit decision creates a conflict in principle with the Eighth Circuit decision in *Cellco v. Hatch* regarding the scope of States' rights to regulate "other terms and conditions" of wireless service. This new decision creates an even more urgent need for the Court to review and to determine the important federal preemption question presented by the petition.

I. The Recent Eleventh Circuit Decision Gives Rise To A Conflict With The Eighth Circuit's Decision in *Cellco*.

The *NASUCA* case, like the *Cellco* case, involves the question of the line between "other terms and conditions" of wireless service, which States are expressly authorized to regulate, and "rates charged" and "entry," which States are preempted from regulating. *See* 47 U.S.C. §332(c)(3)(A); App., *infra*, 1a-37a; Pet. App. 1a-15a. In *NASUCA*, the Eleventh Circuit held correctly that the FCC exceeded its authority when it preempted States from prohibiting or requiring the use of line items on wireless bills. App.,

infra, 3a. The Eleventh Circuit's decision focuses on the plain language of 47 U.S.C. §332(c)(3)(A), which provides that States may not regulate the "rates charged" or "entry" of wireless carriers but expressly preserves State authority over all "other terms and conditions" of wireless service. 47 U.S.C. §332(c)(3)(A). Based on its ordinary meaning, the Eleventh Circuit interpreted the term "rate" to mean the "charge or payment" for wireless service. *See* App., *infra*, 28a-29a. The Eleventh Circuit then properly concluded that a line item on a bill is not a "charge or payment" and, therefore, is a matter that States are free to regulate. App., *infra*, 29a.

The Eighth Circuit, on the other hand, adopted an impermissibly broad interpretation of the term "rates" and the phrase "regulate . . . rates charged" as used in 47 U.S.C. §332(c)(3)(A). The Eighth Circuit found that subdivision 3 of the Minnesota law, which simply requires notice of and consent to substantive contract changes, "effectively regulates rates" because the Eighth Circuit believed the notice and consent requirements might affect mid-term price changes sought by wireless carriers. *See* Pet. App. 8a-12a. Unlike the Eleventh Circuit, the Eighth Circuit failed to recognize that simply because a state law "has some effect on the charge to the consumer does not necessarily place a [state] regulation within the meaning of 'rates' and outside the ambit of state regulation of 'other terms and conditions.'" *See*, App., *infra*, 32a. The federal law only preempts state laws that actually "regulate" the "rates charged," not laws that "affect rates." *See* 47 U.S.C. §332(c)(3)(A). The Eighth Circuit reached its erroneous conclusion that the Minnesota law is preempted by ignoring the plain language of 47 U.S.C.

§332(c)(3)(A) and the true nature of the Minnesota law. *See* Pet. 21-28.

If the Eighth Circuit had applied the reasoning of the Eleventh Circuit, Petitioner believes that the Eighth Circuit would have reached the opposite conclusion. The Minnesota law regulates the contract change process. Subdivision 3 of the law, which was the focus of the Eighth Circuit's analysis, simply requires notice of and customer consent to substantive contract changes. *See* Pet. App. 48a. The subject matter of Minnesota's law – the contract change process – is not a "charge or payment" for wireless service and thus is an "other term or condition" of wireless service that States are free to regulate. Similarly, notice and consent are not "charges or payments" for a service, and therefore are "other terms and conditions" of wireless service that States have the authority to regulate. The Eleventh Circuit's analysis as applied to the Minnesota law at issue confirms that the Eighth Circuit erred when it held that the Minnesota law regulates "rates," not "other terms and conditions."

In addition to the conflict regarding the scope of preemption of regulation of "rates charged" as used in 47 U.S.C. §332(c)(3)(A), there is also an apparent split between the Eighth Circuit and the Eleventh Circuit regarding whether States have the authority to regulate "other terms and conditions" of wireless services through wireless-specific laws or only through laws of general applicability. *See* 47 U.S.C. §332(c)(3)(A). The Eleventh Circuit's decision suggests that States have the authority under Section 332(c)(3)(A) to regulate "other terms and conditions" through either state wireless-specific statutes *or* through laws of general applicability. While the Eleventh Circuit did not expressly address the question, the.

court upheld the authority of States to adopt laws governing the use of line items specifically on wireless bills. *See* App., *infra*, 3a, 29a, 36a-37a. The Eleventh Circuit did not limit state authority over "other terms and conditions" to *only* laws of general applicability. *Id.*

Conversely, the Eighth Circuit's decision in the *Cellco* case could be read to limit state regulatory authority over "other terms and conditions" to only laws of general applicability. Specifically, the Eighth Circuit stated that subdivision 3 of the Minnesota law "cannot be deemed a 'neutral application of state contractual or consumer fraud laws' that avoids the preemptive force of the federal statute." Pet. App. 12a. Courts may rule that this determination prohibits States from adopting or enforcing wireless-specific consumer protection statutes governing "other terms and conditions" of wireless service and thereby bar the use of this critical consumer protection tool. *See* Pet. 14-15.

Thus, the Eleventh Circuit's decision is in apparent conflict with the Eighth Circuit's decision on the fundamental question of the extent to which Congress preserved the States' authority to regulate wireless service. Because of the risk that conflicting decisions throughout the country may emanate from these two circuit decisions, this critical preemption issue requires immediate resolution by the Court.

II. The Eleventh Circuit's Decision Highlights The Need For The Court To Resolve The Important States' Rights Question Presented By The Petition.

The Eighth Circuit's decision in *Cellco* severely and improperly intrudes upon the States' sovereign right, as

preserved by Congress, to use their historic police powers to protect wireless customers from business practices of wireless providers that States have concluded are unfair or unjust. *See* Pet. 7-15; H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588. As a result of the Eighth Circuit's decision, States are left to wonder whether wireless-specific laws or regulations they adopt or seek to enforce, no matter how far removed from the rates actually charged for wireless service, will survive a preemption challenge.

Now, in the wake of the recent Eleventh Circuit *NASUCA* decision, States face even more uncertainty and confusion regarding the scope of their authority to regulate "terms and conditions" of wireless service. The apparent conflict between the circuits leaves the States without any clear guidelines as to the breadth of State authority to regulate wireless service even though Congress expressly preserved broad state authority over *all* "terms and conditions" other than "rates charged" and "entry." As a result, States will continue to be extremely hesitant to enact new wireless consumer protection measures even though the need for such protections is greater than ever. *See* Pet. 2, 14-15.

The Eleventh Circuit's recent decision affirms the need for the Court to determine now the critically important question of the scope of States' rights to protect wireless consumers as preserved by Congress pursuant to 47 U.S.C. §332(c)(3)(A). The *Cellco* case presents the best vehicle for the Court to address this question, which is of great importance to all fifty States and the more than 184 million wireless customers in this country.

Further, if the areas of apparent conflict between the Eighth Circuit *Cellco* decision and the Eleventh Circuit *NASUCA* decision are not addressed by this Court, consumers in some regions of the country may well be deprived of protections provided to consumers in other regions of the country. For example, states in the Eighth Circuit could be barred from enacting or enforcing state wireless-specific laws governing "other terms and conditions" of wireless service, whereas states in the Eleventh Circuit could enact such laws. To permit a federal law to be interpreted in a way that provides fewer protections to a Minnesota cell phone user than to a Georgia user is manifestly unjust.

The States, wireless customers, and even wireless providers need this Court to define the line between preempted regulation of "rates charged" and permissible regulation of "other terms and conditions." It is imperative that this Court act now to resolve the uncertainty and confusion stemming from the inconsistent circuit decisions.

CONCLUSION

For the above reasons, Petitioner respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

457 F.3d 1238

United States Court of Appeals,
Eleventh Circuit.
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, Petitioner,
National Association of Regulatory Utility Commissioners, Intervenor-Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, Respondent,
AT&T Corporation, Cingular Wireless, Inc., Leap Wireless International, Inc., Nextel Communications, Inc., Sprint Corporation, T-Mobile USA, Inc., Verizon, Cellular Telecommunications and Internet Association, Intervenors-Respondents.
Vermont Public Service Board, Petitioner,
v.
Federal Communications Commission, Respondent.
Nos. 05-11682, 05-12601.

July 31, 2006.

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Petitions for Review of Decisions of the Federal Communications Commission.

Before BLACK, PRYOR and COX, Circuit Judges.

PRYOR, Circuit Judge:

The key issue presented in this petition for review is whether the Federal Communications Commission exceeded its authority, under section 332(c)(3)(A) of the Communications Act of 1934, when it issued an order that preempted the states from requiring or prohibiting the use of line items in customer billing for cellular wireless services. 47 U.S.C. § 332(c)(3)(A); *see Truth-in-Billing and Billing Format, Nat'l Ass'n of State Util. Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, 20 F.C.C.R. 6448 (2005) [hereinafter "Second Report and Order" or "the Order"]. The Commission argues, on the one hand, that the regulation of line-item billing involves "rates charged" for cellular wireless services, which is the exclusive province of federal regulation. 47 U.S.C. § 332(c)(3)(A). Representatives of state interests argue, on the other hand, that the regulation of line-item billing involves "other terms and conditions" of

cellular wireless services, which are regulable by the states. *Id.*

This appeal also addresses three threshold issues: (1) whether, under the Hobbs Act, 28 U.S.C. § 2344, this Court lacks subject matter jurisdiction to review the petition filed by the Vermont Public Service Board (the Vermont Board); (2) whether the National Association of Regulatory Utility Commissioners (the State Utility Regulators) may participate as an intervenor; and (3) whether the National Association of State Utility Consumer Advocates (the State Consumer Advocates) has standing to petition for review. As to the threshold issues, we dismiss the petition of the Vermont Board because it is not a "party aggrieved" by the Second Report and Order, but we allow the State Utility Regulators to continue as an intervenor and deny the motion to dismiss the petition of the State Consumer Advocates, which have standing as a consumer of wireless service.

On the key issue, we grant the petitions for review because we conclude that the Commission exceeded its authority when it preempted the states from requiring or prohibiting the use of line items. The scope of federal authority to regulate "rates" or "entry" does not include the presentation of line items on cellular wireless bills. 47 U.S.C. § 332(c)(3)(A). This billing practice is a matter of "other terms and conditions" that Congress intended to be regulable by the states. *Id.*

I. BACKGROUND

The State Consumer Advocates filed a petition with the Commission that requested a prohibition on the use of line items by cellular wireless carriers unless the line item

is mandated by state or federal law. In response to this petition, the Commission issued an order that amended the Truth-in-Billing Rules of the Commission, preempted the states from requiring or prohibiting the use of line items in customer billing for wireless service, and proposed further rulemaking to preempt the states from the regulation of billing practices of wireless service providers. The State Consumer Advocates and the Vermont Board petition for review of the Order by the Commission. Sprint Nextel Corp. and Cingular Wireless LLC (collectively, the Carriers) intervene in support of the Commission, and the State Utility Regulators intervene in support of the Vermont Board.

To explain the context of this appeal, we address three preliminary matters. We first describe the enactment and amendment of the Communications Act and the promulgation of the Truth-in-Billing Rules. We next discuss the petition for declaratory ruling filed by the State Consumer Advocates and the Second Report and Order issued by the Commission in response to that petition. We then discuss motions filed by the Carriers and the Commission to dismiss the petitions of the Vermont Board and the State Consumer Advocates.

A. The Communications Act of 1934 and the Truth-in-Billing Rules

The Communications Act of 1934, 47 U.S.C. §§ 151 to 615b, was enacted "for the purpose of regulating interstate and foreign commerce in communication by wire and radio." *Id.* § 151. The Act vested the Commission with the authority to regulate radio frequencies used in wireless services. *Id.* § 303. In 1993, Congress amended the Communications Act to create a new regulatory class called

"commercial mobile radio service," which is "any mobile service [] that is provided for profit and makes interconnected service available [] to the public or [] to such classes of eligible users as to be effectively available to a substantial portion of the public." *Id.* § 332(d)(1). The amendment granted the federal government exclusive authority to regulate the "rates charged" and "entry" of wireless carriers. *See id.* § 332(c)(3)(A). Although the states were prohibited from regulating "rates" or "entry," the amendment provided that the states could continue to regulate "other terms and conditions" of wireless service. *Id.* § 332(c)(3)(A).

In May 1999, in response to a growing concern with consumer fraud in the provision of telecommunications services, the Commission promulgated the Truth-in-Billing Rules. *In the Matter of Truth-in-Billing and Billing Format*, 14 F.C.C.R. 7492 (1999) [hereinafter "First Report and Order"]. The stated purpose of the Rules was "to ensure that consumers are provided with basic information they need to make informed choices in a competitive telecommunications marketplace, while at the same time protecting themselves from unscrupulous competitors." *Id.* at 7493-94. The Truth-in-Billing Rules required consumer telephone bills to (1) "be clearly organized, clearly identify the service provider, and highlight any new providers"; (2) "contain full and non-misleading descriptions of charges"; and (3) "contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about, or contest charges, on the bill." *Id.* at 7496 ¶ 5.

The Commission exempted wireless service providers from several of these rules, *id.* at 7501-02 ¶¶ 13-19, but the Commission required, among other things, "(1) that the name of the service provider associated with each

charge be clearly identified on the bill; and (2) that each bill should prominently display a telephone number that customers may call free-of-charge in order to inquire or dispute any charge contained on the bill." *Id.* at 7502 ¶ 15. The Commission sought further comment on whether the Truth-in-Billing Rules should be applied to wireless service providers. *Id.* at 7535 ¶ 68.

B. The State Consumer Advocates and the Second Report and Order

The State Consumer Advocates "are state agencies designated by laws of their respective jurisdictions to represent the interests of utility consumers before regulatory agencies and in the courts." The State Consumer Advocates petitioned the Commission for a declaratory ruling that prohibited wireless telecommunications carriers "from imposing any separate line item or surcharge on a customer's bill that was not mandated or authorized by federal, state or local law." *Second Report and Order*, 20 F.C.C.R. at 6449 ¶ 1. A line item is "a discrete charge identified separately on an end user's bill." *Id.* at 6462 ¶ 30. According to the State Consumer Advocates, the use of line items that were not required by federal or state law violated the Truth-in-Billing Rules and the Communications Act because these line items "do not allow customers to accurately assess what they are being billed for or permit customers to determine whether the amounts charged conform to the price charged for service." *Id.* at 6454 ¶ 13 n. 32.

In response to the request for a declaratory ruling filed by the State Consumer Advocates, the Commission issued a notice that solicited comments regarding the petition. The notice stated that the Commission "seeks

comment," about whether telecommunications carriers should be prohibited from "imposing monthly line-item charges, surcharges or other fees on customers bills unless such charges have been expressly mandated by a regulated agency." *Nat'l Ass'n of State Util. Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, 19 F.C.C.R. 9451, 2004 WL 1152127 (2004) (public notice). Comments were submitted by wireless carriers, the State Utility Regulators, the State Consumer Advocates, and individual consumers. Many consumers submitted brief comments that expressed confusion and dissatisfaction with their monthly telephone bills.

After the public comment period closed, during the so-called "permit but disclose" proceedings, *see* 47 C.F.R. § 1.1206, the Commission received ex parte presentations and letters. On March 3, 2005, the State Utility Regulators provided notice of oral and written ex parte communications with the members of the Commission. Also on March 3, the Vermont Board sent an ex parte letter addressed to the five members of the Commission. On March 4, the permit-but-disclose period closed, and communications with the Commission were no longer permitted. *See id.* § 1.1203. On that date, the Vermont Board electronically filed notice of the ex parte letter it had sent on March 3, but the Clerk of the Commission excluded the letter because it "was received during the Sunshine Agenda period, and is associated with, but not made part of the record."

On March 18, 2005, the Commission issued its conclusions in an Order that addressed three issues. First, in a "Second Report and Order," the Commission amended or clarified the Truth-in-Billing Rules and applied these rules to wireless service providers. *Second Report and Order*, 20

F.C.C.R. at 6454-58 ¶¶ 14-20. Second, in a "Declaratory Ruling," the Commission denied the petition filed by the State Consumer Advocates and preempted the states from requiring or prohibiting the use of line items on monthly telephone bills by wireless service providers. *Id.* at 6458-6467 ¶¶ 21-36. Third, the Commission requested a "Second Further Notice of Proposed Rulemaking" that proposed to adopt new rules in the billing practices of wireless service providers. *Id.* at 6467-6478 ¶¶ 37-57.

As to the first issue, the Commission reviewed the history of the Truth-in-Billing Rules and concluded "that [wireless service providers] should no longer be exempt from [the] requirement that billing descriptions be brief, clear, non-misleading and in plain language." *Id.* at 6456 ¶ 16; *see also* 47 C.F.R. § 64.2401(b). The Commission found that "the increasing number of consumer complaints to this Commission and state regulatory agencies regarding wireless billing practices provides empirical evidence that application of the truth-in-billing rules to [wireless service providers] is necessary and in the public interest." *Second Report and Order*, 20 F.C.C.R. at 6457 ¶ 18. The Commission "emphasize[d]" that the application of the truth-in-billing rules to wireless service providers did not "limit[] states' authority to enforce their own generally applicable consumer protection laws, to the extent such laws do not require or prohibit use of line items." *Id.* at 6458 ¶ 20.

As to the second issue, the Commission denied the petition filed by the State Consumer Advocates because "nothing in the *Truth-in-Billing Order* prohibits carriers from using non-misleading line items." *Id.* at 6458-59 ¶ 23. Although the Commission found that consumers and state regulatory agencies were confused about the use of line

items, the Commission "recognize[d] that overbroad state regulations . . . may frustrate our federal rules and the federal objective of minimizing regulatory burdens on the competitive [wireless service provider] industry." *Id.* at 6459-60 ¶ 24. The Commission stated that "it is permissible for carriers to recover [regulatory] costs so long as they do so in a manner that complies" with the Truth-in-Billing Rules, but "it is a misleading practice for carriers to state or imply that a charge is required by the government when it is the carriers' business decision as to whether and how much of such costs they choose to recover directly from consumers through a separate line item charge." *Id.* at 6460-61 ¶¶ 26-27.

The Commission also concluded that "state regulations requiring or prohibiting the use of line items . . . constitute rate regulation and . . . are preempted under section 332(c)(3)(A)" of the Act. *Id.* at 6462 ¶ 30. The Commission explained that "rates," included "rate levels," "rate structures," and "rate elements." *Id.* at 6462-63 ¶ 30. After describing line items as a "rate element," the Commission reasoned that the prohibition or requirement of line items "directly affect[s] the manner in which the [wireless service provider] structures its rates." *Id.* at 6463 ¶¶ 30-31.

The Commission distinguished the ability of the states to mandate or prohibit line items from the ability to impose taxes, state universal service support charges, and other disclosure laws, which the Commission left undisturbed. *Id.* at 6464-65 ¶¶ 32-33. The Commission explained that "requiring or prohibiting the use of line items" has a "direct effect" on the ability of wireless service providers to structure rates, but other state regulations have an "indirect effect . . . on a company's behavior." *Id.*

at 6466 ¶ 34 (quoting *Wireless Consumers Alliance Order*, 15 F.C.C.R. 17,021, 17,034 ¶ 23 (2000)). The Commission stated that it "may not always be clear" whether line item regulation is preempted by section 332(c)(3)(A), and it was necessary to look to the "substance, [and] not merely the form of the line item." *Id.*

The Commission premised its decision to preempt state regulation on "the pro-competitive, deregulatory framework for [wireless service providers] prescribed by Congress." *Id.* at 6466 ¶ 35. The Commission stated, "Congress has directed that the rate relationships between [wireless service] providers and their customers be governed 'by the mechanisms of the competitive marketplace.'" *Id.* (quoting *Wireless Consumers Alliance Order*, 15 F.C.C.R. at 17,032-33 ¶¶ 20-21). Because wireless service providers "have come to structure their offerings on a national or regional basis," state laws that prohibit or require the use of line items would result in a "patchwork of inconsistent rules" that "conflict[s] with federal policies." *Id.*

As to the third issue, the Commission solicited comments about "the role of states in regulating billing" and "other truth-in-billing issues." *Id.* at 6468 ¶ 37. The Commission sought comments about whether other state regulation of billing practices was preempted by the Communications Act. *Id.* at 6474 ¶ 50. The Commission explained that "limiting state regulation of . . . billing practices [by wireless service providers] . . . will eliminate the inconsistent state regulation that is spreading across the country, making nationwide service more expensive for carriers to provide and raising the cost of service to consumers." *Id.* at 6475 ¶ 52.

The State Consumer Advocates and the Vermont Board filed petitions for review of the Order. The State Utility Regulators intervened in support of the Vermont Board. Sprint Nextel and Cingular Wireless, public corporations that provide cellular wireless services, intervened in support of the Commission.

C. Motions Filed After the Petition for Review

After the State Consumer Advocates and the Vermont Board petitioned for review of the Order, the Commission moved to dismiss both the petitions of the State Consumer Advocates and the Vermont Board. The Commission argued that the State Consumer Advocates lacked standing to petition for review on behalf of its members because the State Consumer Advocates failed to establish that "at least one of its members meets the minimal Article III prerequisites for standing to sue." The Commission contended that we lacked subject matter jurisdiction to consider the petition of the Vermont Board because it was not a party to the agency proceedings under the Hobbs Act. 28 U.S.C. § 2344. The Carriers supported the motion to dismiss of the Commission.

The Vermont Board responded that it was a "party aggrieved" because it had participated in the proceedings, 28 U.S.C. § 2344, or alternatively, was a party because the Commission "expressly subjected the [the Vermont Board] to its Order." First, the Vermont Board argued that it had participated in the Commission proceedings because it both submitted comments in the first Truth-in-Billing Order, which had the same agency docket number, and sent an ex parte letter to the Commissioners on March 3 that was deemed untimely by the Clerk of the Commission. The

Vermont Board moved to correct the administrative record by including the ex parte letter. Second, the Vermont Board argued that even if it had failed to participate in the agency proceedings, it could petition for review because it was "directly bound" by the Order.

The State Consumer Advocates responded that their association has standing to challenge the Order either on behalf of its members or as a consumer of wireless service. The State Consumer Advocates argued that they have associational standing because the members of the State Consumer Advocates are charged by state statutes "to advocate on behalf of consumers." In support of this argument, the State Consumer Advocates submitted affidavits from three individual members of the State Consumer Advocates who are consumers of wireless telecommunications service. The affidavits stated that the preemption Order "will make it difficult to enact . . . new state laws . . . that are necessary to protect wireless customers from unreasonable, misleading, deceptive or illegal line item fees and charges." The State Consumer Advocates attached the affidavit of John Perkins, the President of the State Consumer Advocates, who testified, "NASUCA is itself a consumer of telephone services. . . . All of the monthly bills for service received by [the State Consumer Advocates] contain line items."

In response to these arguments, the Commission moved to withdraw the motion to dismiss the State Consumer Advocates, but continued to move for dismissal of the Vermont Board. The Carriers then submitted their own motion to dismiss the petition of the State Consumer Advocates on the same grounds the Commission had argued in its withdrawn motion. We granted the motion by the Commission to withdraw its motion to dismiss the

petition of the State Consumer Advocates, and we ordered that the motions to dismiss the petitions of the State Consumer Advocates and the Vermont Board be carried with the case. The motion of the Vermont Board to correct the administrative record was also carried with the case.

II. STANDARD OF REVIEW

We review our subject matter jurisdiction *de novo*. *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir.2001). We review whether a party has standing to challenge an order *de novo*. *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir.), *cert. denied*, ___ U.S. ___, 126 S.Ct. 377, 163 L.Ed.2d 164 (2005). We review the authority of the Commission to regulate under the Communications Act based on the standard enunciated in *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984).

III. DISCUSSION

Before we address the petitions for review, we must consider issues about our jurisdiction. We first address whether the Vermont Board is a "party aggrieved" by the Order under the Hobbs Act. 27 U.S.C. § 2344. Because we conclude that the Vermont Board is not a party aggrieved, we next consider whether the State Utility Regulators may continue as intervenors. We then address whether the State Consumer Advocates have standing to petition for review of the Order. After we conclude that the State Consumer Advocates and the State Utility Regulators have standing, we then turn to the merits of the petitions for review: whether section 322(c)(3)(A) expressly preempted

the ability of the states to require or prohibit the use of line items by wireless service providers.

A. The Vermont Board Is Not a "Party Aggrieved" Under the Hobbs Act.

The Communications Act provides, "Any proceeding to enjoin, set aside, annul, or suspend any order of the [Commission] . . . shall be brought as provided by and in the manner prescribed in" the Hobbs Act. 47 U.S.C. § 407(a). The Hobbs Act vests exclusive jurisdiction in the courts of appeals to "determine the validity of [] all final orders of the [Commission]." 28 U.S.C. § 2342. "Any party aggrieved by the final order may . . . file a petition to review the order. . . ." *Id.* § 2344. "A 'party aggrieved' is one who participated in the agency proceeding." *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1366 (11th Cir.2002). A nonparty to the proceeding of the Commission must file a petition for reconsideration as a condition precedent to judicial review of the Order. 47 U.S.C. § 405(a).

The Vermont Board presents three arguments that it is a "party aggrieved" by the Order. 28 U.S.C. § 2344. First, the Vermont Board contends that, because it participated in the First Report and Order, which shares the same docket number as the Second Report and Order, it has participated in the proceedings. Second, the Vermont Board argues that it is a "party aggrieved" because it submitted an ex parte letter to the members of the Commission, which the Vermont Board alleges was erroneously excluded from the administrative record. As part of this argument, the Vermont Board moves to correct the administrative record by including the ex parte communication. Third, the Vermont Board argues that even if it did not participate in the proceedings, it may challenge the Order

because it is subject to the Order and its arguments challenge the authority of the Commission. We address each argument in turn and conclude that each argument fails.

1. Participation in the First Report and Order Does Not Render the Vermont Board a "Party Aggrieved."

The Vermont Board argues that the comments it submitted in the proceedings for the First Report and Order confer party status on it to petition for review. Because the docket number for the First Report and Order, Docket No. 98-170, is the same as the Second Report and Order, the Vermont Board argues that it is a "party aggrieved" under the Hobbs Act. We disagree.

The reliance by the Vermont Board on the docket number to argue that it is a "party aggrieved" by the Second Report and Order is misplaced. Under the Hobbs Act, "[a]ny party aggrieved *by the final order*" may petition for review. 28 U.S.C. § 2344. Although the First and Second Orders and Report share the same docket number, the Hobbs Act confers party status on those who participated in proceedings that led to the Order under review. *See Ala. Power Co.*, 311 F.3d at 1366.

The Vermont Board is not a "party aggrieved by the final order" because the Vermont Board petitions for review of the Second Report and Order. 28 U.S.C. § 2344. Regardless of the docket number assigned to the proceeding, the Vermont Board had to be a participant in the proceedings that led to the Second Report and Order to be a "party aggrieved." *Id.* The comments that the Vermont Board submitted in the proceedings that led to the First

Report and Order are immaterial: those comments make the Vermont Board a "party aggrieved by" the First Report and Order, but they do not make the Vermont Board a "party aggrieved by" the Second Report and Order. *Id.; see Simmons v. ICC*, 716 F.2d 40, 45 (D.C.Cir.1983) (stating that the petitioner was not a "party aggrieved" where the petitioner participated in a proceeding that was "procedurally and substantially independent" from the challenged order).

2. The Ex Parte Letter Submitted by the Vermont Board Failed to Comply with Regulations Issued by the Commission.

The Vermont Board also contends that it participated in the Commission proceeding because it submitted an ex parte letter that it asserts was erroneously excluded from the administrative record. The Commission did not include the letter in the administrative record because the Vermont Board electronically submitted notice of the letter during the "Sunshine" period when no communication was allowed with the Commissioners. *See* 47 C.F.R. 1.1203(a). The Vermont Board moves to correct the administrative record by including the letter. We address the motion filed by the Vermont Board before we consider whether the ex parte letter is sufficient to confer the Vermont Board with party status.

We have discretion to correct the administrative record to "supply any omission from the record or correct a misstatement." Fed. R.App. P. 16(b). An administrative record consists of "the order sought to be reviewed or enforced, the findings or reports on which it is based, and the pleadings, evidence and proceedings before the agency." Fed. R.App. P. 16(a). We may deny a motion to

correct the record where, among other reasons, the proffered item does not fall within the definition of the record, *see Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1324 (D.C.Cir.1984), the proffered item is immaterial or incomplete, *Ala. Tissue Ctr. of Univ. of Ala. v. Sullivan*, 975 F.2d 373, 376 (7th Cir.1992), or the agency did not have the opportunity to consider the evidence, *see Altawil v. INS*, 179 F.3d 791, 792 (9th Cir.1999).

The regulations of the Commission provide that ex parte presentations are allowed during the permit-but-disclose period of the agency proceeding. 47 C.F.R. § 1.1206(a). Ex parte presentations shall be included in the administrative record if the presentation includes a cover letter and "shall clearly identify the proceeding to which it relates, including the docket number, if any, shall indicate that two copies have been submitted to the Secretary, and must be labeled as an ex parte presentation." 47 C.F.R. § 1.1206(b)(1). To be considered, ex parte communications must comply with these provisions. *See id.* § 1.1206(a).

The Vermont Board concedes that its electronic submission on March 4 failed to include a cover letter to explain that it provided notice for the March 3 ex parte letter. There was no way for the Commission to discern that the letter electronically filed on March 4 disclosed an ex parte communication that timely had been submitted to the five Commissioners. Because the electronic submission failed to identify that it disclosed an ex parte letter submitted on March 3, it is not properly part of the record that the agency should have included. 47 C.F.R. § 1.1206(b)(1) (stating that the cover letter that provides notice "must be labeled as an ex parte presentation"); *see Deukmejian*, 751 F.2d at 1324 ("In discharging their

obligation to monitor agency action, courts review a record compiled by the agency and containing its rationale and supporting findings. . . ."). The Commission followed its regulations when it excluded the ex parte letter from the administrative record.

We deny the motion to supplement the record with the ex parte letter. "We must give substantial deference to an agency's interpretation of its own regulations," *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 2386, 129 L.Ed.2d 405 (1994), and the Commission was not "arbitrary and capricious" when it excluded the letter from the administrative record, 5 U.S.C. § 706(2)(A). The Vermont Board did not "participate in the proceedings" by submitting the letter. *Ala. Power Co.*, 311 F.3d at 1366.

3. No Exception Exists to Allow the Vermont Board to Petition for Review of the Order.

The Vermont Board alternatively argues that, even if it did not participate in the proceedings, it is a party entitled to petition for review of the Order for two reasons. First, the Vermont Board contends that it is a "party aggrieved" because it is subject to the Order. Second, the Vermont Board argues that "party status is not . . . required when the agency has acted beyond its authority."

The argument that the Vermont Board may petition for review because it is subject to the Order fails because the Vermont Board misunderstands the scope of our jurisdiction. The Hobbs Act confers the courts of appeals with subject matter jurisdiction to review the orders of administrative agencies. "Since petitioners were never parties to the rulemaking proceedings, this court simply

does not have jurisdiction over their claim." *Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1218 (D.C.Cir.1973). The cases cited by the Vermont Board are inapposite because they involve the extension of personal jurisdiction, *Gilchrist v. Gen. Elec. Cap. Corp.*, 262 F.3d 295, 300-01 (4th Cir.2001), *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 955 (4th Cir.1999), or the relaxation of prudential standing requirements, *Devlin v. Scardelletti*, 536 U.S. 1, 7-8, 122 S.Ct. 2005, 2009-10, 153 L.Ed.2d 27 (2002). These cases do not allow a court to expand the statutory grant of subject matter jurisdiction to review an agency decision.

The argument that a petitioner need not be a party when the petitioner challenges the authority of an administrative agency runs contrary to our precedent. We have held that "[a] 'party aggrieved' is one who participated in the agency proceeding." *Ala. Power Co.*, 311 F.3d at 1366. In support of its argument, the Vermont Board cites two decisions from the Fifth Circuit, *see Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n. 1 (5th Cir.1984); *Am. Trucking Ass'ns, Inc. v. ICC*, 673 F.2d 82, 84 n. 4 (5th Cir.1982), but we are bound by our decision that a petitioner must be a "party aggrieved" without regard to the type of challenge the petitioner seeks to bring. *Ala. Power Co.*, 311 F.3d at 1366; *cf. Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228, 238 n. 24 (5th Cir.2005) (stating that the exception to party status discussed in *American Trucking Ass'ns* has been "squarely rejected by some of our sister circuits"); *see also Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 167 F.3d 111, 112 (2d Cir.1999) (concluding that the discussion in *American Trucking Ass'ns* is dictum and *Wales Transportation* erroneously relied on *American Trucking Ass'ns*). The Vermont Board is not a "party

aggrieved" entitled to petition for review of the Order by the Commission.

We grant the motion by the Commission to dismiss the petition of the Vermont Board. Neither the participation of the Vermont Board in the First Report and Order nor the ex parte letter that was procedurally deficient confer party status on the Vermont Board, and no exception excuses the failure of the Vermont Board to participate in the proceedings of the Commission. We lack jurisdiction to consider the petition filed by the Vermont Board.

B. The State Utility Regulators May Proceed As an Intervenor.

Although we dismiss the Vermont Board, the State Utility Regulators may continue as an intervenor. "Intervention . . . cannot create jurisdiction if none existed before," *7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure* § 1917, at 457-58 (2d ed.1986), but we have discretion to "treat intervention as a separate action, especially when the intervenor has an independent basis for jurisdiction," *Atkins v. State Bd. of Educ. of N.C.*, 418 F.2d 874, 875 (4th Cir.1969) (per curiam); *see 7C Wright, Miller & Kane, Federal Practice and Procedure* § 1917, at 458-59; *see also Fuller v. Volk*, 351 F.2d 323, 328-29 (3d Cir.1965). Because the State Utility Regulators participated in the proceedings by submitting comments and notice of ex parte communications, the State Utility Regulators have independently established their status as "party aggrieved." 28 U.S.C. § 2344. We exercise our discretion to allow the State Utility Regulators to continue in the petition for review.

C. The State Consumer Advocates Have Standing to Petition for Review.

The Constitution of the United States limits the subject matter jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const., Art. III § 2. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). The minimum requirements for constitutional standing are "injury in fact," "a causal connection between the injury and the conduct complained of," and that the "injury will be redressed by a favorable decision." *Id.* at 560-61, 112 S.Ct. at 2136. On a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* at 561, 112 S.Ct. at 2137.

The Carriers move to dismiss the State Consumer Advocates for failure to establish associational standing. The Carriers contend that the State Consumer Advocates cannot establish that at least one of their members has suffered particularized injury and only the member agencies of the State Consumer Advocates have the authority to petition for review. The State Consumer Advocates argue that we need not address this argument because they have standing on an alternative ground.

The State Consumer Advocates argue that they need not rely on associational standing because they are a consumer of wireless telecommunications services that receives bills. The affidavit submitted by the State Consumer Advocates from the President of their organization stated, "NASUCA is itself a consumer of telephone services, both wireline and wireless. It presently has wireline service with Verizon and AT&T and wireless service with

Verizon Wireless. All of the monthly bills for service received by NASUCA contain line items."

The State Consumer Advocates have established "general factual allegations of injury resulting from the defendant's conduct." *Lujan*, 504 U.S. at 561, 112 S.Ct. at 2136. The State Consumer Advocates contend that, because the preemption of the Commission affects the ability of the states to regulate the disclosure of charges on consumer wireless bills, the Order adversely affects the interests of the State Consumer Advocates as a consumer of wireless service. The complaints of the State Consumer Advocates are redressable by granting the petition and vacating the Order of the Commission. That disposition would allow the states to require or prohibit the use of line items by wireless service providers, which the State Consumer Advocates contend would protect consumers from fraud.

The Carriers argue that the State Consumer Advocates may not rely on their status as a consumer of wireless service as a basis for standing because the State Consumer Advocates "chose not to base [their] right to seek review on [their] own receipt of phone bills" in the petition for review. We disagree. When ruling on motions to dismiss for lack of standing, federal courts may consider affidavits and other factual materials in the record. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 881, 110 S.Ct. 3177, 3185, 111 L.Ed.2d 695 (1990) (considering affidavits submitted in response to a motion for summary judgment to establish standing); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 233, 110 S.Ct. 596, 609, 107 L.Ed.2d 603 (1990), *overruled in part on other grounds by City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004) ("[S]tanding . . . must affirmatively

appear *in the record.*" (internal quotations and citations omitted) (emphasis added)). Because the State Consumer Advocates have established standing to petition for review as a consumer of wireless service through the affidavit of their President, we deny the motion by the Carriers. We next turn to the merits of the petitions for review filed by the State Utility Regulators and the State Consumer Advocates.

D. The Commission Exceeded Its Authority When It Preempted State Regulation of Line-Item Billing Under Section 332(c)(3)(A).

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land[,] . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art VI. "The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986). "[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Id.* at 369, 106 S.Ct. at 1887-88.

"Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *Fid. Fed. Sav. & Loan v. De la Cuesta*, 458 U.S. 141, 153-54, 102 S.Ct. 3014, 3022-23, 73 L.Ed.2d 664 (1982) (quoting *United States v. Shimer*, 367 U.S. 374, 381-82, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961)). Where a federal agency preempts state law, "the inquiry becomes whether the federal agency has properly exercised its own delegated

authority rather than simply whether Congress has properly exercised the legislative power." *New York v. FCC*, 486 U.S. 57, 68, 108 S.Ct. 1637, 1642, 100 L.Ed.2d 48 (1988). "Federal regulations have no less pre-emptive effect than federal statutes." *Fid. Fed. Sav. & Loan*, 458 U.S. at 153, 102 S.Ct. at 3022.

Federal law may preempt state law in three ways. First, express "[p]re-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law." *La. Pub. Serv. Comm'n*, 476 U.S. at 368, 106 S.Ct. at 1898. Second, conflict preemption occurs "when there is outright or actual conflict between federal and state law." *Id.* Third, field preemption occurs "where compliance with both federal and state law is in effect physically impossible." *Id.* "[T]he categories of preemption are not rigidly distinct . . . field pre-emption may be understood as a species of conflict pre-emption." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S.Ct. 2288, 2294, 147 L.Ed.2d 352 (2000); *see* Caleb Nelson, *Preemption*, 86 Va. L.Rev. 225, 262 (2000).

"'[T]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (plurality opinion) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978)). "[A]ny understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86, 116 S.Ct. 2240, 2250, 135 L.Ed.2d 700 (1996). "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977)).

Courts interpret the text of the statute and apply traditional cannons of statutory construction to discern the intent of Congress. *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229, 114 S.Ct. 2223, 2231, 129 L.Ed.2d 182 (1994); *see, e.g., La. Pub. Serv. Comm'n*, 476 U.S. at 369, 106 S.Ct. at 1899.

"When we consider issues that arise under the Supremacy Clause . . . , we start with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress." *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir.2004). "Although the Constitution makes a few of the federal government's powers exclusive, the states retain concurrent authority over most of the areas in which the federal government can act." Nelson, *supra*, at 225. We accordingly presume that "Congress does not cavalierly pre-empt state[ ]law." *Medtronic, Inc.*, 518 U.S. at 485, 116 S.Ct. at 2250. "[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Although the presumption against preemption cannot trump our review of the Order under *Chevron*, this presumption guides our understanding of the statutory language that preserves the power of the States to regulate "other terms and conditions." *See Smiley v. Citibank, N.A.*, 517 U.S. 735, 743-44, 116 S.Ct. at 1730, 1735, 135 L.Ed.2d 25 (1996). We apply these principles to determine whether Congress granted

the Commission authority to preempt the state regulation of line item billing.

In the Second Report and Order, the Commission preempted state regulation of line-item billing based on the express language of the Communications Act. *See* 20 F.C.C.R. at 6462-63 ¶ 30, 6466 ¶ 35. The Commission concluded that the language of section 332(c)(3)(A) of the Communications Act "'prohibit[s] states from prescribing, setting or fixing rates' of wireless service providers." *Id.* at 6462 ¶ 30 (quoting *Pittencrieff Commc'ns, Inc.*, 13 F.C.C.R. 1735, 1745 (1997)). The Commission explained that "[e]fforts by individual states to regulate [wireless service providers'] rates through line item requirements . . . would be inconsistent with the federal policy of a uniform, national and deregulatory framework" of the Communications Act. *Id.* at 6467 ¶ 35.

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." *Chevron U.S.A.*, 467 U.S. at 842-43, 104 S.Ct. at 2781. First, we consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* To determine if "Congress has directly spoken to the precise question at issue," *id.*, courts interpret the language of the statute and apply traditional cannons of statutory construction, *see MCI Telecomms. Corp.*, 512 U.S. at 229, 114 S.Ct. at 2231. "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a reasonable basis in law[, b]ut the courts are the final authorities on issues of statutory construction." *SEC v.*

Sloan, 436 U.S. 103, 118, 98 S.Ct. 1701, 1712 (1978) (internal citations and quotations omitted); *see also Chevron U.S.A.*, 467 U.S. at 842-43, 104 S.Ct. at 2781-82.

Second, "if the statute is silent or ambiguous *with respect to the specific issue*, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A.*, 467 U.S. at 843, 104 S.Ct. at 2782 (emphasis added). To determine whether a term within a statute is ambiguous, we consider the context in which the term is used. *See MCI Telecomms. Corp.*, 512 U.S. at 226, 114 S.Ct. at 2229 (explaining that *Chevron* deference applied because "contextual indications" created ambiguity in the term "modify"). The interpretation of an ambiguous statute by an administrative agency is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44, 104 S.Ct. at 2782. "Unexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, ___ U.S.___, 125 S.Ct. 2688, 2699, 162 L.Ed.2d 820 (June 27, 2005).

The Commission premised the preemption of state regulation of line item billing on the language of section 332(c)(3)(A). That provision states that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A). The Commission found that "Congress did not specifically define 'rates,' 'entry,' or other key terms in section 332(c)(3)(A)," but explained that "rate regulation extends to regulation of

'rate levels' and 'rate structures' for" wireless service providers. *Second Report and Order*, 20 F.C.C.R. at 6462-63 ¶ 30 (citing *Sw. Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19,898, 19,906-07 ¶¶ 18-20(1999)). The Commission reasoned that the "type of state regulations in question reveals that many directly affect [wireless service providers'] rates and rate structures in a manner that amounts to rate regulation." *Id.* at 6463 ¶ 31. We disagree with this reasoning.

The language of section 332(c)(3)(A) unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills. Although the term "rates charged" is not defined in the Communications Act, the meaning of this term is clear in this context. A straightforward reading of the complementary phrases "regulate entry of or the rates charged" and "other terms and conditions," 47 U.S.C. § 332(c)(3)(A), evidences the "clear and manifest purpose of Congress" to leave the regulation of line items to the states, *Cliff,* 363 F.3d at 1122.

A "rate," as defined by the Oxford English Dictionary, is "[t]he amount of a charge or payment . . . having relation to some other amount or basis of calculation." Oxford English Dictionary (2d ed.1989). Other dictionaries define a "rate" as "[a]n amount paid or charged for a good or service," Black's Law Dictionary 1268 (7th ed.1999), or "a charge per unit of a public-service commodity," Merriam-Webster Online Dictionary, *available at* www.m-w.com/cgi-bin/dictionary (last visited June 27, 2006). "[A]s a basic rule of statutory interpretation, we read the statute using the normal meanings of its words." *Horton Homes, Inc. v. United States*, 357 F.3d 1209, 1211 (11th Cir.2004) (quoting *Consol. Bank, N.A. v. Dep't of Treas.* 118 F.3d 1461,

1463 (11th Cir.1997)). "In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters v. Metro. Ed. Enters., Inc.*, 519 U.S. 202, 207, 117 S.Ct. 660, 664, 136 L.Ed.2d 644 (1997) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388, 113 S.Ct. 1489, 1494, 123 L.Ed.2d 74 (1993)).

The prohibition or requirement of a line item affects the presentation of the charge on the user's bill, but it does not affect the amount that a user is charged for service. State regulations of line items regulate the billing practices of cellular wireless providers, not the charges that are imposed on the consumer. Because the presentation of line items on a bill is not a "charge or payment" for service, Oxford English Dictionary (2d ed.1989), it is an "other term or condition" regulable by the states, 47 U.S.C. § 332(c)(3)(A).

The Commission argues that the Second Report and Order is consistent with its previous decisions because the prohibition or requirement of line items "directly affect[s] [wireless service providers'] rates and rate structures in a manner that amounts to rate regulation." *Second Report and Order*, 20 F.C.C.R. at 6463 ¶ 31. According to the Commission, section 332(c)(3)(A) prohibits the state regulation of "rate structures" and "rate levels." *Id.* at 6462-63 ¶ 30. The Commission contends that state regulation of the use of line items "directly intrudes upon the carrier's ability to set rates and establish rate structures for [wireless] service." This argument fails.

In the Second Report and Order, the Commission failed to follow the common definition of "rates" employed in its previous decisions. The Commission has stated that

"'rate' is defined in the dictionary as an 'amount of payment or charge based on some other amount.'" *Sw. Bell Mobile Sys., Inc.*, 14 F.C.C.R. at 19,901 ¶ 19. The Commission has also ruled that the phrase "rates charged" "'prohibit[s] states from prescribing, setting or fixing rates' of wireless service providers." *Cellular Telecomms. Indus. Ass'n v. FCC*, 168 F.3d 1332, 1336 (D.C.Cir.1999) (quoting *Pittencrieff Commc'ns., Inc.*, 13 F.C.C.R. 1735, 1745 ¶ 20 (1997)).

Until now, the Commission has consistently applied the distinction between "rates" and "other terms and conditions" to interpret whether a regulation amounts to rate regulation under section 332(c)(3)(A). 47 U.S.C. § 322(c)(3)(A). The Commission has concluded that the states may not regulate the method by which wireless service providers calculate the length of a call because it affects "which services to charge for and how much to charge for these services." *Sw. Bell Mobile Sys., Inc.*, 14 F.C.C.R. at 19,898 ¶ 1. Consistent with the distinction of "rates" and "other terms and conditions," the Commission has permitted the states to require wireless service providers "to contribute to state universal service mechanisms." *Pittencrieff*, 13 F.C.C.R. at 1741 ¶ 13. A universal service mechanism is a charge imposed by state or federal law on providers of telephone service "to make communications services available to all Americans at affordable rates." *Cellular Telecomms. Indus. Ass'n*, 168 F.3d at 1334. Even though universal service charges have an "impact on the rates charged" to consumers, the Commission concluded that "universal service contribution requirement is not, within the plain meaning of the statute, a rate or entry regulation." *Pittencrieff*, 13 F.C.C.R. at 1742 ¶¶ 15,

16. Both decisions by the Commission follow the definition of "rates" in the dictionary as a "charge or a payment."

The Commission, by contrast, has defined a line item on a bill as something for which "a consumer receives no tangible product." *First Report and Order*, 14 F.C.C.R. at 7531 ¶ 61. According to the definitions espoused by the Commission, a line item is not a rate because "line-item charges cannot be attributed to individual tangible articles of commerce," *id.* at 7531 ¶ 61, but "a 'rate' has no significance without the element of service for which it applies," *Sw. Bell Mobile Sys., Inc.*, 14 F.C.C.R. at 19,901 ¶ 19. The Commission asserts that the state regulation of line items affects "rate structures," but these regulations do not require a carrier to recover nor prohibit a carrier from recovering a particular cost. These regulations pertain only to the presentation of that cost on customer bills.

The Commission also failed adequately to explain its conclusion that a line item falls within the definition of "rates" because the use of line items has an alleged direct effect on rates. In the Second Report and Order, the Commission explained that "requiring or prohibiting the use of line items" has a "direct effect" on the ability of wireless service providers to structure rates, but other state regulations have an "indirect effect . . . on a company's behavior." *Second Report and Order*, 20 F.C.C.R. at 6466 ¶ 34 (quoting *Wireless Consumers Alliance Order*, 15 F.C.C.R. 17,021, 17,034 ¶ 23 (2000)). The Commission requested further comments because it "recognize[s] that the line between prohibited and permissible state regulations of line items may not always be clear." *Id.* (internal quotations and citations omitted). The attempt by the Commission to distinguish the regulation of line items on

cellular wireless bills from the imposition of universal service charges is unavailing.

That the prohibition or requirement of a line item has some effect on the charge to the consumer does not necessarily place a regulation within the meaning of "rates" and outside the ambit of state regulation of "other terms and conditions." The Commission argues that rate regulation includes the regulation of "rate structures" and "rate levels," *id.* at 6463 ¶ 31, but rate levels and rate structures are still components of "rates." The inclusion of the specific components "rate levels" or "rate structures" within the general term "rates" does not magically expand the authority of the Commission beyond what the statutory language allows.

The Commission has disavowed the argument that a regulation with some effect on prices is per se rate regulation under section 322(c)(3)(A). The Commission, for example, has upheld state regulations that require wireless service providers to contribute to the state-wide universal service fund as an "other term or condition." *Pittencrieff*, 13 F.C.C.R. at 1742 ¶¶ 42-43, *aff'd sub nom. Cellular Telecomms. Indus. Ass'n*, 168 F.3d at 1332. The Commission, in *Pittencrieff*, expressly rejected the argument that the imposition of a universal service fee was rate regulation because it "impacts the rates that a [wireless service] provider charges its customers." *Id.* at 1745 ¶ 20. The Commission stated, "The Commission has found the 'rates charged by' language to prohibit states from prescribing, setting, or fixing rates of [wireless service] providers. We have not found, however, that it preempts state authority over matters which may have an impact on the costs of doing business for a [wireless service] operator." *Id.* (footnotes omitted). "To equate state action that

may increase the cost of doing business with rate regulation would . . . forbid nearly all forms of state regulation, a result at odds with the 'other terms and conditions' portion of the first sentence." *Cellular Telecomms. Indus. Ass'n*, 168 F.3d at 1336, *aff'g Pittencrieff*, 13 F.C.C.R. 1735. If the imposition of a universal service charge has an "indirect" relationship with rates that places it within the purview of "other terms and conditions," then requiring or prohibiting the use of line items has an even more attenuated relationship with rates.

We can discern no logical distinction between what the Commission terms a "direct effect" caused by the regulation of line items and the alleged "indirect effect" caused by the imposition of universal service charges. *Second Report and Order*, 20 F.C.C.R. at 6466 ¶ 34. The Commission fails to explain why the imposition of universal service charges, which increases the amount a consumer is charged, is more attenuated to the amount a consumer pays for service than the regulation of line items, which affects the presentation of matters on a bill. The Commission is unable to articulate a logical distinction between these two outcomes.

The Commission also contends that the Second Report and Order "is consistent with prior Commission statements equating 'line items' with 'rate elements.'" *Second Report and Order*, 20 F.C.C.R. at 6463 ¶ 30 & n. 83. In support of this argument, the Commission relies on its decision in *Federal-State Joint Board of Universal Service*, 17 F.C.C.R. 24,952 (2002). In that decision, the Commission ruled that incumbent local exchange carriers may "recover their federal universal service contributions costs through a separate line item" as long as carriers do not

"include[] a mark-up above the relevant contribution factor." *Id.* at 24,970 ¶ 31.

This argument fails for at least two reasons. First, *Federal-State Joint Board* is inapposite because the authority of the Commission to regulate federal universal service contribution derives from section 254(d) of the Communications Act, not section 332(c)(3)(A). The decision in *Federal-State Joint Board* does not govern whether the regulation of line items by the states is preempted under section 332(c)(3)(A). *Compare* 47 U.S.C. § 254(d) (granting the Commission authority to impose federal universal service charges), *with id.* § 332(c)(3)(A) (granting the Commission authority to regulate "entry" and "rates"). Second, although the Commission stated in *Federal-State Joint Board* that a federal universal service contribution is a "rate element" which may be recovered through a line item, *id.* at 24,979 ¶ 53 n. 133, the Commission did not equate the *imposition* of the universal service contribution with the *presentation* of the universal service contribution on the bill. *Federal-State Joint Board* does not equate "line items" with "rate elements."

In the Second Report and Order, the Commission also misconstrued the legislative history of section 332(c)(3)(A). *See Second Report and Order*, 20 F.C.C.R. at 6464 ¶ 32. The House Committee Report regarding section 332(c)(3)(A) explained that "other terms and conditions" of wireless service, which are regulated by the states, "include such matters as customer billing information and practices and billing disputes and other consumer protection matters." H.R.Rep. No. 103-111, at 211 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588. Because "our sole concern is the intent of Congress . . . , it is necessary to look to the administrative and legislative background of

the enactment." *United States v. Zacks*, 375 U.S. 59, 62, 84 S.Ct. 178, 180, 11 L.Ed.2d 128 (1963). Contrary to the argument of the Commission, the legislative history shows that Congress intended to leave the authority to regulate line items with the states.

The Commission dismisses this statement from the legislative history as unpersuasive because it "nowhere suggests that states may regulate rates in the guise of regulating billing practices." The Commission explains that although "not all regulation relating to a carrier's billing and its relationship with customers represents preempted 'rate regulation,'" state regulations that require or prohibit line items are regulation. *Second Report and Order*, 20 F.C.C.R. at 6464 ¶ 33. The Commission counsels that we should look to the "substance, not merely the form" of the regulation to determine if it has a direct effect on rates. *Id.* at 6466 ¶ 34 (quoting *Wireless Consumers Alliance Order*, 15 F.C.C.R. at 17,037 ¶ 28).

This argument is flawed for at least two reasons. First, the Second Report and Order belies the contention by the Commission that line items are not a "billing practice." In the Order, the Commission expressly classifies the use of line items as a "billing practice." *Id.* Second, although we agree that the "substance, not merely the form" of a regulation governs whether it is rate regulation, *id.*, the Commission does not articulate the "substance" that distinguishes whether a regulation of line items is a billing practice or rate regulation. The prohibition or requirement of the use of line items on wireless bills involves "billing information and practice," not "rates."

The interpretation of the term "rates" urged by the Commission deprives the complementary phrase "other

terms and conditions" of all meaning. 47 U.S.C. § 332(c)(3)(A). "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 449, 151 L.Ed.2d 339 (2001). If the presentation of line items on consumer bills were a matter of "rates" and not an "other term[] or condition[]" of wireless service, then the Commission would be free to preempt virtually any form of state regulation of wireless service, including laws regarding disclosure and consumer protection. 47 U.S.C. § 332(c)(3)(A). Under the interpretation of the Commission, even powers historically retained by the states, such as the imposition of state taxes, would be preempted so long as they impact "how carriers recover [the] costs of doing business." *Cf. Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110, 20 L.Ed. 65 (1871) ("[T]he modes adopted to enforce the taxes levied [by the states] should be interfered with as little as possible."). The failure of the Commission to delineate the proper scope of rate regulation allows the Commission indefinitely to expand its authority without regard to the mandate by Congress that "other terms and conditions" remain the realm of state regulation. 47 U.S.C. § 332(c)(3)(A).

The interpretation by the Commission that the prohibition or requirement of line items is expressly preempted by the language of section 332(c)(3)(A) is not supported by the common definition of "rates." A "rate," as defined in the dictionary and previous decisions by the Commission, is "[t]he amount of a charge or payment." Oxford English Dictionary (2d ed.1989); *see Sw. Bell Mobile Sys., Inc.*, 14 F.C.C.R. at 19,901 ¶ 19. Because the regulation of line-item billing is not rate regulation, the express language of

section 332(c)(3)(A) of the Communications Act does not preempt state regulations that require or prohibit the use of line items on cellular wireless bills.

IV. CONCLUSION

We GRANT the motion to dismiss the petition of the Vermont Board for lack of subject matter jurisdiction. We DENY the motion by the Vermont Board to correct the administrative record. We also DENY the motion by the Carriers to dismiss the petition of the State Consumer Advocates for lack of standing. Because the Communications Act allows the states to regulate line item billing for wireless services, we GRANT the petitions for review filed by the State Consumer Advocates and the State Utility Regulators and VACATE the Second Report and Order.

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IN THE

Supreme Court of the United States

MIKE HATCH,
Attorney General of Minnesota,

Petitioner,

v.

CELLCO PARTNERSHIP
d/b/a VERIZON WIRELESS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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STATEMENT PURSUANT TO RULE 29.6

Respondents' corporate disclosure statement was set forth at page *ii* of the Brief in Opposition, and there are no amendments to that statement.

SUPPLEMENTAL BRIEF FOR RESPONDENTS

Pursuant to Supreme Court Rule 15.8, Respondents respectfully submit this supplemental brief in order to address a recent decision of the United States Court of Appeals for the Eleventh Circuit, *National Association of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238 (11th Cir. 2006) ("*NASUCA*").[1] Contrary to Petitioner's contention, this case does not conflict, "in principle" or otherwise, with the decision of the United States Court of Appeals for the Eighth Circuit in *Cellco Partnership v. Hatch*, 431 F.3d 1077 (8th Cir. 2005), Pet. App. 1a-15a ("*Cellco*"). Although both decisions arise under Section 332(c)(3)(A), the type of state laws at issue in each case – and thus the results reached under the statute – are entirely different. Accordingly, as the Solicitor General recently explained on behalf of the United States as *amicus curiae*, there is no circuit split here and the issuance of the Eleventh Circuit decision alters nothing; as the Solicitor General also explained, the issuance of a writ of certiorari to the Eighth Circuit is not warranted.

ARGUMENT

Tellingly, Petitioner does not claim a true circuit split but only a "conflict in principle." Supp. Br. 1. As an initial matter, this "conflict in principle" is framed at such a high level of generality as to be meaningless for purposes of the question whether to grant the petition for certiorari. The scope of States' rights to regulate wireless service under Section 332(c)(3)(A), *see id.*, is such a broad topic that, under Petitioner's theory, an issue worthy of this Court's review would arise every time one Court of Appeals reached a different result with respect to federal preemption under a particular statute than another Court of Appeals, regardless of the nature of the state action at issue or the facts of the case. In any event, a "conflict in principle," as opposed to an *actual* conflict, is insufficient to justify the exercise of this Court's certiorari jurisdiction. "[T]here must be

1. The *NASUCA* decision is reprinted in Petitioner's Supplemental Brief, Supp. Br. 1a-37a, and is not reproduced herein.

a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Robert L. Stern et al., Supreme Court Practice § 4.3 (8th ed. 2002).

There is no conflict – in principle or otherwise – between the decisions of the Eighth and Eleventh Circuits. On the one hand, in *Cellco*, the Eighth Circuit adjudicated a direct challenge to a Minnesota statute that effectuated a rate freeze in violation of the express preemption provision in Section 332(c)(3)(A). Specifically, the Court of Appeals had before it a statute, Minn. Stat. § 325F.695 (2004) (codifying 2004 Minn. Law Ch. 261, art. 5) ("Article 5"), that imposed waiting periods on wireless carrier rate changes, in contravention of existing contracts. The Court of Appeals determined that: (i) Article 5's 60-day waiting period for increases in wireless rates freezes rates for at least that period of time; (ii) even accepting the State's argument that the 60-day period is not mandatory, the approval mechanism for rate increases requiring that customers "opt in" fixes rates for those customers who decline to opt in, for the entire term of their existing wireless service agreements; and (iii) even if, contrary to all intuition, some customers agreed to a price increase, the rate would be frozen until that assent was manifested. Pet. App. 9a-10a. With respect to Section 332(c)(3)(A), the Court of Appeals explained that it precludes States from "'fixing rates . . . of providers.'" Pet. App. 9a (quoting *Petition of Pittencrieff Communications, Inc.*, 13 FCC Rcd 1735, 1745 (1997), aff'd *Cellular Telecomms. Indus. Ass'n v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999) ("*Pittencrieff*")).

Based on these findings, the Eighth Circuit held that a "waiting period on any proposed rate changes, whether it be for 60 days or some shorter period pending a customer's decision to 'opt in,' has a clear and direct effect on rates" – *i.e.*, by "fixing" rates – and thus constitutes prohibited rate regulation under Section 332(c)(3)(A). Pet. App. 12a. There was no dispute in *Cellco* that the charges at issue constituted "rates" within the meaning of Section 332(c)(3)(A).

On the other hand, in *NASUCA*, the Eleventh Circuit reviewed pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), an order of the Federal Communication Commission ("FCC") finding that state prohibitions and requirements of line item charges on customer bills interfere with wireless rate structures and thus are preempted by Section 332(c)(3)(A). The Eleventh Circuit overturned the FCC's construction of the statute because, in the court's view, the statutory term "rates" does not encompass charges that appear in line items. *See* Supp. Br. App. 29a (holding that "rates" means a "'charge or payment' for service" and that line items are not charges for service). The Eleventh Circuit also rejected the FCC's position that line item mandates have a "direct effect" on rates, finding any connection between line item mandates and rates (as the Court of Appeals understood the term) to be "even more attenuated" than other regulation the Commission previously found not to constitute impermissible rate regulation. *See id.* at 33a.

Clearly, there is no conflict between the holdings of the Eighth and Eleventh Circuits. *See* Stern, *supra* p. 2 ("[A]ny effort to mislead the Court into viewing a conflict in principle as a real conflict is almost invariably futile."). The Eighth Circuit, based on a fact-intensive review of the operation of the challenged state law, concluded that Article 5 created a rate freeze and thus was preempted under Section 332(c)(3)(A) because it effectively fixed (and thus had a clear and direct effect on) rates. The Eleventh Circuit, by contrast, held that the FCC's construction of Section 332(c)(3)(A) as preempting line item mandates was contrary to the plain meaning of the statute because line items are not "rates" and because line item mandates do not have a direct effect on "rates."[2]

2. Moreover, the decision of the Eleventh Circuit is not yet final. Petitions for panel and en banc rehearing of that decision were filed by the wireless industry and the FCC on September 14, 2006. This lack of finality is yet another reason to deny certiorari. *See* Stern, *supra* p. 2 ("A well-established ground for granting certiorari . . . is the existence

(Cont'd)

There is not even any inconsistency between the Eighth and Eleventh Circuits' understanding of Section 332(c)(3)(A). Indeed, both decisions make clear that state action that fixes or sets wireless rates is preempted under the statute, citing the same FCC decision with apparent approval. *Compare Cellco*, Pet. App. 9a (stating that "'fixing rates of . . . providers' is rate regulation") (quoting *Pittencrieff* at 1745), *with NASUCA*, Supp. Br. App. 30a (stating that "the phrase 'rates charged' prohibit[s] states from prescribing, setting or fixing rates of wireless service providers") (citing *Cellular Telecomms. Indus. Ass'n*, 168 F.3d at 1336 as quoting *Pittencrieff* at 1745, which held that "prescribing, setting, or fixing rates" is preempted). Thus, both decisions *support* the proposition that fixing or prescribing carriers' rates is preempted.

And contrary to Petitioner's suggestion, *see* Supp. Br. 2, the Eighth Circuit did not adopt a definition of "rates charged" that differs from the Eleventh Circuit's. In fact, the Eighth Circuit did not define that term *at all*. It was undisputed below that Article 5 affected "rates"; the question was whether the statute affected them in a way that constituted prohibited regulation. While Petitioner argued that the statute only regulated the contract change process, not prices for wireless service, the Eighth Circuit (correctly) disagreed.

Petitioner also asserts an "apparent split" between the Circuits on the validity of wireless-specific laws, as opposed to laws of general applicability, under the "other terms and conditions" language of the statute. *See* Supp. Br. 3. This "apparent conflict," *id.* at 4, is based on a hypothetical tension between a "suggest[ion]" in *NASUCA* that States may take either approach (an issue Petitioner admits the Eleventh Circuit "did not expressly address," *id.* at 3), and the possibility that *Cellco* "could be read," *id.*, to limit state action to laws of general applicability. Petitioner articulates a concern about "the risk that conflicting decisions throughout the

(Cont'd)
of a conflict between the decision as to which review is sought and that rendered by . . . some lower court *whose judgment is final in the absence of Supreme Court review*." (emphasis added)).

country may emanate" from these two opinions. *See id.* But "apparent" or hypothetical future conflicts based on what are admittedly nothing more than inferences from the Eighth and Eleventh Circuit decisions are not the proper basis for certiorari.

Nor does the Eleventh Circuit opinion create "more uncertainty and confusion" about the scope of state authority under Section 332(c)(3)(A). Supp. Br. 5. Under the Eighth Circuit's ruling, States may not pass laws or adopt regulations that, like Article 5, fix rates by imposing a freeze on wireless rates for any period of time. Under the Eleventh Circuit's decision, which vacated the FCC's order on express preemption, States presently are no longer constrained by the agency's determination that line item mandates are prohibited by Section 332(c)(3)(A). There is no greater uncertainty now, following the issuance of the decision in *NASUCA*, than there was at the time the petition for certiorari was filed. Quite the contrary, States now have more judicial guidance about the regulatory boundaries set by Section 332(c)(3)(A) than they did before.

In sum, Petitioner's effort to manufacture a conflict should be rejected. The Eleventh Circuit held that line item mandates fall within permissible regulation of "other terms and conditions" chiefly because line items are not "rates charged." The Eighth Circuit concluded that a wholly different type of state action – the imposition of a freeze on what were indisputably "rates charged" – amounted to prohibited rate regulation. The two decisions do not adopt conflicting rules of law but simply apply Section 332(c)(3)(A) to two different types of state action and reach different conclusions as to express preemption. This does not yield anything close to a circuit split, much less a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923).

CONCLUSION

For the foregoing reasons, and all those stated in the Brief in Opposition, the petition for a writ of certiorari should be denied.

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No. 05-1159

In The Supreme Court of the United States

MIKE HATCH, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MINNESOTA AND NOT AS AN INDIVIDUAL,

Petitioner,

v.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

This brief responds to the Brief for the United States as Amicus Curiae submitted by the Solicitor General ("Solicitor's Br."). The Solicitor ignores Congress's clear intent to preserve the States' historic authority to adopt consumer protection measures like the Minnesota Wireless Consumer Protection Act, Art. 5, Minn. Stat. §325F.695 (2004) ("Article 5"), and fails to recognize that the court of appeals erred when it preempted Article 5. Minnesota along with thirty-six other States, on behalf of the more than 184 million wireless customers in this country, respectfully ask this Court to accept the petition.

I. Congress Preserved Broad State Authority Over Terms And Conditions Of Wireless Service.

As the Solicitor concedes, States have long had the authority to regulate telephone service, including wireless service, consistent with the dual federal-state regulatory scheme. Solicitor's Br. 2. Indeed, until 1993, States had full authority to regulate intrastate common carrier wireless service. H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

When Congress amended the wireless regulatory framework in 1993, it preserved traditional State authority to regulate all "terms and conditions of commercial mobile services" (a/k/a wireless service) other than "rates charged" and "entry." 47 U.S.C. §332(c)(3)(A). Congress intended this express preservation of state authority over "other terms and conditions" to be interpreted expansively.

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and *other consumer protection matters*; facilities siting issues (e.g., zoning); transfers of control;

> the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. *This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."*

H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

The Solicitor ignores this clear statement of Congressional intent. Instead, the Solicitor mischaracterizes the States' current authority over wireless service, contending that "Congress eliminated dual federal and state regulation and established instead a uniform 'Federal regulatory framework to govern the offering of all' wireless telephone services." Solicitor's Br. 2 (citing legislative history of Section 332(c)(1), not 332(c)(3)(A), and a Federal Communications Commission ("FCC") order out-of-context).[1]

The plain language of Section 332(c)(3)(A) refutes this claim. Dual federal and state regulation still plainly exists; the States are preempted only from regulating "rates charged" and "entry," but are expressly authorized to regulate *all* "other terms and conditions." 47 U.S.C. §332(c)(3)(A); *see also*, H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588 (providing

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[1] The Solicitor focuses on the legislative history of 47 U.S.C. §332(c)(1), which sets forth the new federal, as opposed to state, regulatory framework for wireless services. Contrary to the assertion of the Solicitor, the history cited *does not* provide that all state regulatory authority over wireless service is eliminated. H.R. Conf. Rep. 103-213, at 490, *reprinted in* 1993 U.S.C.C.A.N. 1088, 1179. Similarly, the FCC order cited by the Solicitor refers to legislative history adopted in relation to the use of competitive bidding for radio frequency licenses. *See Connecticut Dep't of Pub. Util. Control*, 10 F.C.C.R. 7025, 7034 (¶14, n.44) (1995).

"states still would be able to regulate the terms and conditions of [wireless] services").

The Solicitor also erroneously claims that "Congress limited [wireless] regulation to situations 'for which the Commission and the states could demonstrate a clear-cut need.'" Solicitor's Br. 3. Notably, the Solicitor does not limit this claim to regulation of "rates charged," even though the FCC order it cites was issued in direct response to a request for continued state rate regulation. This is an unabashed and unsupportable narrowing of the actions of Congress. Section 332(c)(3)(A) does not require States to "demonstrate a clear-cut need" to regulate "other terms and conditions" of wireless service. Congress clearly and intentionally preserved the States' unfettered authority to regulate these areas.

II. The Assumption Against Preemption Applies To The Minnesota Law.

The Solicitor is also wrong when he argues that "the 'assumption of nonpreemption' has no application" in this case. Solicitor's Br. 13. The Solicitor inexplicably fails to apply the preemption standard set forth in this Court's recent opinion in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Instead, the Solicitor relies on two older, less relevant cases. Solicitor's Br. 13 (citing *United States v. Locke*, 529 U.S. 89, 108 (2000); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)).

In *Bates*, this Court reaffirmed that "[i]n areas of traditional state regulation, [the Court] assume[s] that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" 544 U.S. at 449 (citations omitted). States have traditionally had authority to regulate wireless telephone service. H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588. Therefore, as the court of appeals

correctly recognized, the assumption against preemption applies with full force to Article 5.

The older cases cited by the Solicitor do not even support the Solicitor's mistaken position. These cases recognize that *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) provides that the assumption against preemption applies where, as here, Congress has legislated "in a field which the States have traditionally occupied." *See Locke*, 529 U.S. at 108; *Buckman Co.*, 531 U.S. at 347. Further, unlike this case, both *Locke* and *Buckman Co.* address areas that historically have been of exclusive federal concern and involve questions of implied preemption. *See Locke*, 529 U.S. at 99, 111-12; *Buckman Co.*, 531 U.S. at 347-48.

III. The Court of Appeals Erred In Finding The Minnesota Law Is Preempted.

The Solicitor incorrectly asserts that the court of appeals properly concluded that Article 5 is preempted by Section 332(c)(3)(A). The Solicitor fails to show that Congress clearly and manifestly intended to preempt the law. *See Bates*, 544 U.S. at 449. The Solicitor also ignores that the court of appeals was required to adopt the clearly plausible interpretation of Section 332(c)(3)(A) advanced by Petitioner. *See id.*

Instead, the Solicitor erroneously argues that Article 5 "fixes," "freezes," or constitutes "state-oversight" of rates through a "state-imposed" maximum charge or "ceiling" and therefore "regulates" the "rates charged." *See* Solicitor's Br. 8-12. The Solicitor claims that rate regulation has commonly been understood to include "laws that 'fix the prices a utility could charge,'" and "to include both governmental rate prescriptions . . . and limitations on rate increases." Solicitor's Br. 8-9. The cases cited by the Solicitor, however, *actually support the Petitioner's view* that the notice and consent requirements in Article 5 do

not "regulate" the "rates charged," but instead regulate "other terms and conditions."

All of the cases cited by the Solicitor involve a government entity establishing a *specific dollar amount* that the utility had to charge or could not exceed. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 381-82 (1932) (a specific maximum rate of 71 cents established by the Interstate Commerce Commission); *Mobile Oil Exploration & Producing S.E., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 219 (1991) ($2.57 ceiling per million Btus established by the Federal Energy Regulatory Commission); *Permian Basin Area Rate Cases*, 390 U.S. 747, 763 (1968) (specific maximum area gas rates established by the Federal Power Commission); *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 477, 489 (2002) (rate schedules that a utility could charge enacted by a legislature and state agencies authorized to set specific rates).

In addition, in *Permian Basin* and *Mobile*, the limits on rate increases, cited by the Solicitor, were adopted pursuant to broad grants of regulatory authority. *See Permian Basin*, 390 U.S. at 754, n.1, 755; *Mobile*, 498 U.S. at 219, 222-223, 226-227. The agencies were not limited to regulating only "rates charged." *Id.* Further, in all four cases cited by the Solicitor, the rate regulation was premised on the common overriding statutory mandate that the utility only charge reasonable rates. *See Arizona Grocery Co.*, 284 U.S. at 384-386; *Mobile Oil*, 498 U.S. at 222-223; *Permian Basin*, 390 U.S. at 754, n.1, 756, n.8; *Verizon*, 535 U.S. at 477, 481-484, 489.[2]

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[2] Contrary to the Solicitor's assertion, Petitioner never stated that regulation of "rates charged" could *only* occur through state requirements for filing of tariffs. If a state legislature were to fix a specific maximum rate for wireless service, like $40 a month, the law would regulate rates charged. Article 5 does no such thing.

Conversely, Article 5 does not establish a *specific dollar amount* that the utility must charge or cannot exceed, and Article 5 does not require that rates be reasonable. Article 5 is indifferent as to the amount charged. The Minnesota law leaves it to the customer and the company to determine the specific amount charged, whether that be $40 per month or $400 a month. Therefore, the law does not "fix," "freeze," "oversee," or otherwise "regulate" the "rates charged" by wireless carriers.

Further, the FCC orders relied on by the court of appeals and the Solicitor do not mandate a different conclusion. None of these orders addresses whether a requirement for prior notice of and consent to wireless contract changes "regulates" the "rates charged" or "other terms and conditions." *See* Pet. App. 7a-9a (citing *Pet. on Behalf of the State of Hawaii, Pub. Util. Comm'n*, 10 F.C.C.R. 7872, 7882 (1995) ("*Hawaii Order*"); *Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19898, 19907 (1999); *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, 17022 (2000); *Pet. of Pittencrieff Commc'ns, Inc.*, 13 F.C.C.R. 1735, 1745 (1997)); Solicitor's Br. 9-11 (citing the same FCC orders).

In addition, the *Hawaii Order*, relied upon by the Solicitor for the proposition that a "state-imposed delay in the effective date of rate increases constitutes 'rate regulation,'" is inapplicable here. The *Hawaii Order* involved a 1994 request by the State of Hawaii pursuant to Section 332(c)(3)(B) to retain its preexisting rate regulation authority. The "state-imposed delay" in that case was the required filing of tariffs with the Hawaii commission for approval before a rate change. *See Hawaii Order*, 10 F.C.C.R. at 7882 (¶46). In addition, Hawaii law at the time required wireless rates to be reasonable. *See id.* at 7879 (¶¶30-31); *see also* Haw. Rev. Stat. Ann. §269-16 (1994). Article 5, on the other hand, *does not* involve filing of tariffs or review of rates by the State of Minnesota, and there is *no*

requirement that wireless rates charged in Minnesota be reasonable.

The Solicitor is improperly overreaching by attempting to expand the phrase "regulate . . . rates charged" beyond its normal meaning just as the FCC did in *National Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1258 (11th Cir. 2006) ("*NASUCA*"). The use of the word "any" in Section 332(c)(3)(A) does not expand the terms "rates charged" and "regulate" beyond their normal meanings as demonstrated by Congress's intent to preserve broad State authority over all "other terms and conditions." The Solicitor's argument, and the court of appeals' conclusion, that Article 5 "regulates" "rates charged" simply by requiring notice of and consent to contract changes renders the reservation of State authority over "other terms and conditions" virtually meaningless, a result contrary to law.

The Solicitor and court of appeals also erroneously conclude that Article 5 is preempted because it has a "'clear and direct effect on rates.'" *See* Solicitor's Br. 13. Section 332(c)(3)(A) does not preempt laws that "affect" rates; it only preempts laws that "*regulate* . . . the rates charged." 47 U.S.C. §332(c)(3)(A) (emphasis added); *see NASUCA*, 457 F.3d at 1255 ("That the . . . requirement . . . has some effect on the charge . . . does not necessarily place a regulation within the meaning of 'rates' and outside the ambit of state regulation of 'other terms and conditions.'") In any event, Article 5 does not have a "clear and direct effect on rates." Article 5 simply addresses the notice and consent required for substantive contract changes. The effect it has on rates, if any, would be *indirect*, resulting only if a provider wanted to increase existing contract rates without giving notice and without obtaining the customer's affirmative consent. Article 5, therefore, regulates the contract change process, not the

amount of "rates charged." *See* Pet. 24-28; Supplemental Br. for Pet'r 1-4.

Finally, the Solicitor's interpretation of Section 332(c)(3)(A), if followed, would have devastating consequences for consumers. Wireless providers could change rates without any prior notice to customers, leaving customers to find out about the change only *after* they receive a bill. There is absolutely no evidence that Congress intended to allow this type of unfair business practice or intended to deny States the authority to adopt basic measures to protect consumers from such a practice. In fact, Article 5 *furthers* Congress's goals by leaving the establishment of the "rate[] charged" to the company and the customer and by ensuring that the consumer is protected through a fair contract change process. *See* H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.[3]

IV. The States And Consumers Need Guidance From The Court On The Critical States' Rights Issues Presented.

The federal questions presented here are of great importance to all fifty States and the more than 184 million wireless consumers in this country. The Solicitor claims this case is of "limited importance" to Minnesota and of even less importance to other States. Solicitor's Br. 17. Yet, the Attorneys General of thirty-six States support the petition. *See* Amici Br. of Michigan, *et al.* These States recognize that this Court, not the court of appeals, should determine the scope of state authority under Section

[3] Contrary to the Solicitor's assertion, Article 5 does not interfere with the wireless companies' ability to respond quickly to competitors' price changes. Solicitor's Br. 11. In a competitive market, one would expect prices to go down, not up. Nothing in the Minnesota law precludes carriers from lowering their prices immediately.

332(c)(3)(A) to regulate unfair business practices of wireless providers.

The Solicitor does not dispute that the wireless industry is rife with customer complaints. *See* Pet. 2; Solicitor's Br. 1-19. As six national consumer groups explained, the States play a vital role in protecting the ever increasing number of wireless consumers and it is imperative that this Court uphold the sovereign authority of the States to protect citizens. *See* Amici Br. of AARP, *et al.*

The Solicitor contends that the States are not precluded from enacting laws of general applicability requiring notice and consent to wireless contract changes. *See* Solicitor's Br. 17. Yet, if the notice requirement in Article 5 "fixes rates," its inclusion in a law of general applicability would have the same effect. The Solicitor's position, therefore, is logically inconsistent.

The Solicitor also erroneously suggests that the decision below does not call into question the authority of the States to enact and enforce wireless-specific laws so long as those laws do not "fix[]" or have a "'clear and direct effect on [CMRS] rates.'" *See* Solicitor's Br. 18. If Article 5 has a "clear and direct effect on rates," it is not clear which wireless-specific laws would pass this test. The decision below leaves real confusion about the scope of States' rights to adopt wireless-specific laws.

Finally, the Solicitor cannot dispute that as a result of the recent *NASUCA* case,[4] the States face even more

[4] The Solicitor misstates the standard applied by the Eleventh Circuit Court of Appeals to determine whether regulations are preempted. Solicitor's Br. 16. The Eleventh Circuit did not hold that the test is whether a state requirement "affects" the amount charged but rather applied the ordinary definition of "rate" to determine whether a state requirement regulates rates charged. *See NASUCA*, 457 F.3d at 1254-1256, 1258. In fact, the Eleventh Circuit expressly recognized that

(Continued on following page)

uncertainty regarding the scope of their authority to regulate wireless service. This decision makes it more critical than ever that this Court determine the scope of the States' authority, as expressly preserved by Congress in Section 332(c)(3)(A), to protect wireless customers from unfair business practices.

CONCLUSION

Minnesota respectfully requests that the petition for a writ of certiorari be granted.

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simply because a requirement "has some effect on the charge" does not mean it regulates "rates." *Id.* at 1255.

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REPLY FOR PETITIONER

This case presents novel and critical questions regarding the scope of States' rights, as specifically preserved by Congress pursuant to 47 U.S.C. § 332(c)(3)(A) ("Section 332"), to enact laws to protect wireless customers in this country from unfair business practices. These federal questions are ripe for review and the Court's decision will impact the ability of all fifty States to protect the more than 184 million wireless customers in the United States from unscrupulous business practices. Respondents' Brief in Opposition cannot mask the exceptional importance of the questions presented and the need for immediate review.

The Court of Appeals decided these important questions in a manner clearly contrary to Congress's intent and the plain language of Section 332, when it concluded that States are without authority to require consent to, or even prior notice of, substantive wireless contract changes. *See* Pet. 21-28. The Court of Appeals then went beyond the specific issues before it, strongly suggesting that States are without authority to enact wireless-specific consumer protection laws of *any type*. *See* Pet. 14.

Respondents' claim that the issues presented here are not worthy of review defies logic. Likewise, Respondents' claim that wireless customers are "extraordinarily" satisfied and have no need for state consumer protection measures is baseless.

Thirty-six States and six national consumer groups have filed amici curiae briefs urging this Court to grant the petition. The participation of amici in this case soundly refutes Respondents' position that this case presents no issues of national importance. Almost three-quarters of the

States ask this Court to recognize that the Court of Appeals' decision directly and erroneously denies the States their sovereign right, as preserved by Congress, to protect citizens from the unfair business practices of the wireless industry. *See* Amici Br. of Michigan, *et al.* at 5-8, 19-20. Similarly, the amici brief of the six national consumer groups confirms that consumers face pervasive problems in their dealings with wireless providers and that States must have the authority to prevent abuses by providers. *See* Amici Br. of AARP, *et al.* at 9-14. This Court's immediate intervention is necessary to remedy the Court of Appeals' erroneous interpretation of Section 332.

I. The Questions Presented Are Of Extraordinary National Importance And Should Be Reviewed Immediately.

A. A Split In Authority Is Not A Prerequisite For Review By This Court.

A pressing need exists for this Court to review the extraordinarily important question of the scope of States' rights to protect wireless customers as preserved by Congress under Section 332. The immediacy of this need far outweighs Respondents' suggestion that this Court should wait to review the questions presented until some unknown date when a split in authority develops, if one develops at all.[1] A split in authority, however, is not a

[1] Petitioner does not assert a conflict among the circuits because no other circuit court has decided the novel questions presented here. The Eighth Circuit's *analysis* of the scope of preempted state regulation of "rates charged" in Section 332, however, conflicts in principle with the Seventh Circuit's analysis of that same issue. In *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1074 (7th Cir. 2004), the Seventh Circuit held that claims involving laws of general applicability that do not

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prerequisite to review by this Court. Sup. Ct. R. 10. Where, as here, a court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, the Court clearly has discretion to grant review of the decision below. *Id.*

This Court should not defer consideration of the questions in this case until other lower courts have ruled. Indeed, it is possible that a split in authority may never exist, as the erroneous ruling of the Eighth Circuit may be relied upon by courts throughout the country, resulting in a Pac-Man-like consumption of States' rights. In fact, wireless providers have already used the decision below in a case currently pending before the Eleventh Circuit to argue for preemption of state measures governing the use of line-items on bills (including taxes and regulatory fees). *See* Br. of Wireless Industry Intervenors in Support of Respondent, *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, No. 05-11682-DD (11th Cir. Jan. 12, 2006) (petition for review of declaratory ruling portion of *Truth-in-Billing and Billing Format*, 20 FCC Rcd. 6448 (2005)); *Vt. Pub. Serv. Bd. v. FCC*, No. 05-12601-DD (11th Cir. Jan. 12, 2006) (same). As confirmed by thirty-six States and six national consumer organizations, a determination by this Court is needed now.

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require a court to assess the reasonableness of rates charged do not involve preempted state regulation. If the Eighth Circuit had applied similar reasoning to the Act, it would have found that the Act is not preempted by 47 U.S.C. § 332(c)(3)(A); nothing in the Act allows the State to assess the reasonableness of the amount charged. Pet. 21-28.

B. This Case Presents Issues Of Immense National Significance.

Respondents' efforts to minimize the significance of the Eighth Circuit's decision fail entirely. First, Respondents assert that it is uncertain how other lower courts will interpret and apply the decision. Yet, uncertainty regarding the application of any recent court of appeals decision by other courts exists in every case before review by this Court; such feigned uncertainty should not stop this Court from concluding that the Court of Appeals' decision is of national importance. *See Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (granting petition where a court of appeals decision "casts doubt" on the laws of twenty-three other States).

Second, as highlighted by a recent United States district court decision, the Eighth Circuit's reasoning not only calls into question the right of States to enact wireless-specific consumer protection laws, *but also* impacts the authority of the States to enact laws targeted at *landline* telecommunications carriers. *See OCMC, Inc. v. Norris*, No. 4:06-CV-00069, 2006 WL 1070954, at *9 (S.D. Iowa Apr. 24, 2006) (discussing the argument of a long distance carrier that the decision below supports federal preemption of a state consumer protection law applicable to landline telecommunications carriers because it is not a law of general applicability).

Third, Respondents' astounding claim that review is unnecessary because "customer satisfaction with wireless service is extraordinarily high," Br. in Opp'n 15, is completely unfounded and ignores abundant evidence to the contrary. Respondents' argument is based *solely* on the number of wireless complaints received by the Federal

Communications Commission ("FCC") *in one three-month period* in 2005. Respondents fail to mention that only a miniscule portion of all customers with complaints even know to contact the FCC, and a decline in *complaints* to one agency in one three-month period does not demonstrate wireless customers are "extraordinarily" satisfied with their service. *See* C.A. App. 0435 (AARP 2003 Wireless Telephone Study). To the contrary, a wealth of evidence demonstrates that wireless customers continue to face widespread problems with their wireless providers. *See* Amici Br. of AARP, *et al.* at 9-13; Pet. 2-5. *See also,* Press Release, Michigan Office of the Attorney General, *available at* http://www.michigan.gov/ag/0,1607,7-164-34739-143440-,00.html (last visited May 16, 2006) (stating cell phone complaints to the Michigan Attorney General are up fifty percent from 2005). The participation of thirty-six States and six national consumer groups as amici demonstrates that wireless customers continue to face problems and need the States to provide remedies.

Similarly, the undisputed facts completely refute the Respondents' claim that wireless companies do not unilaterally change wireless contracts. Testimony of Minnesota wireless customers before the Minnesota Legislature and filed with the district court is clear: wireless companies in Minnesota frequently extended contracts or added new fees *without notice to* or *consent of* the customer. *See, e.g.,* C.A. App. 0304-06, 0322-24, 0333, 0361, 0423-24.

Respondents' claim that customers already have adequate remedies to combat these unfair practices is equally unpersuasive. Contrary to Respondents' assertion, switching providers is not an effective remedy for customers whose contracts are extended without their consent. Like Minnesota citizen John Povejsil, such customers are

trapped in their contracts unless they pay the termination fees demanded by the company. *See* C.A. App. 0335-36. Similarly, filing a lawsuit in state court alleging violations of laws of general applicability is not an effective remedy for a customer in this unfortunate situation. It is simply not cost effective to hire a lawyer for the amount at issue. *See id.* Likewise, filing a complaint with the FCC has proven to be a meaningless remedy for consumers. *See* Amici Br. of AARP at 13-14.

Finally, Respondents themselves have conceded in the past that this case presents critical issues of national importance. Joint Mot. for a Stay Pending Appeal of the Dist. Ct.'s Partial Dissolution of its TRO at 1, *Cellco P'ship v. Hatch*, 431 F.3d 1077 (8th Cir. 2004) (No. 04-3198) (stating "[t]his case presents critical questions of first impression in this Circuit . . . "; requesting the court "to maintain the status quo pending resolution of this issue of national importance, . . . "). Indeed, little doubt exists that if the Court of Appeals had reached the opposite conclusion and correctly found that the Act is not preempted by federal law, Respondents themselves would be seeking review by this Court.

II. The Petition Is Timely.

Respondents also contend that the Court should deny review because this case is a "flawed vehicle." Br. in Opp'n 18. This contention is meritless.

First, the Respondents erroneously assert that the sunset provision in the Act negates the need for review. The Act is not scheduled to sunset until August 1, 2007. If the Court were to grant the petition, the Minnesota Legislature would have the full 2007 session to extend or

to repeal the sunset in the Act. Minnesota's legislature is fully capable of extending a statute's sunset date. *See, e.g.*, 2005 Minn. Laws, 1st Spec. Sess., ch. 1, art. 2, § 20 (extending sunset for off-road vehicle damage accounts). If the Court grants the petition, the Court will certainly have sufficient time to issue its opinion before August 1, 2007. The Court's decision will provide Minnesota, other States, and the lower courts across the country the guidance that they desperately need regarding the line between permissible state regulation of "terms and conditions" of wireless service and impermissible state regulation of "rates charged."

Second, Respondents cite two bills introduced in the Minnesota Legislature to argue that the Act may be "legislatively superseded." Br. in Opp'n 19. Respondents fail to inform this Court that neither bill made it out of committee, even though the committee deadlines have long since passed. *See* Minnesota Legislature website, *available at* http://www.leg.state.mn.us/ (last visited May 16, 2006) (providing the status of Minnesota H.F. 2983 and S.F. 2988). Further, the legislative biennium is set to end on May 22, 2006, making it highly improbable that the Act will be superseded by either of these bills. *See id.*; Minn. Const. art. IV, sec. 12.

Third, Respondents' argument that this Court should deny review because further proceedings might be necessary is particularly stunning. *Nowhere* is it required that a case may only be heard by this Court if it is a full and final resolution of all issues in a case. This Court, like all appeals courts, often decides cases in which remand is warranted to allow consideration of additional issues. *See, e.g.*, *Marshall v. Marshall*, 547 U.S. ___, 126 S. Ct. 1735 (2006); *Ayotte v. Planned Parenthood*, 546 U.S. ___, 126

S. Ct. 961 (2006); *Lincoln Property Co. v. Roche*, 546 U.S. ___, 126 S. Ct. 606 (2005); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004).

III. Congress Did Not Intend To Preempt Wireless-Specific Laws Like The Act.

The Court of Appeals erroneously found the Act is preempted by Section 332 without making the requisite finding that it was Congress's "clear and manifest" intent to preempt such a law. Pet. 21-29. Respondents, like the Court of Appeals, blatantly ignore the required presumption against preemption.

Moreover, there is not a single piece of legislative history that shows that Congress intended to adopt an exceedingly broad definition of the scope of preemption of state regulation of "rates charged." In fact, the legislative history of 47 U.S.C. § 332(c)(3)(A) evidences Congress's intent to give a narrow meaning to "rates charged" and preserve broad state authority over "other terms and conditions" of wireless service, including consumer protection matters:

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and *other consumer protection matters*; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. *This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."*

H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

The Respondents also continue to argue that the length of the contract is a "rate charged" within the meaning of Section 332, citing this Court's decision in *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998). The Court's discussion of rate regulation in *Central Office* is readily distinguishable from the circumstances discussed in this case. In *Central Office*, this Court discussed the term "rates" in relation to the filed-rate doctrine and 47 U.S.C. § 203, which includes much more expansive language than that at issue in 47 U.S.C. § 332(c)(3)(A). Section 203(c) makes it unlawful for a telephone company to "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified" in a tariff filed with the FCC. This Court explained that the language used in that section necessarily included not just "charges" but "the classifications, practices, and regulations affecting such charges," that is other terms and conditions. *See Central Office*, 524 U.S. at 223. In contrast, however, Congress used plain language in Section 332 to specifically distinguish between "rates charged by" wireless providers and "other terms and conditions." Therefore, *Central Office* is entirely inapplicable to this case. The Court of Appeals erred when it preempted the Act, and its decision must be reversed.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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In the Supreme Court of the United States

MIKE HATCH, ATTORNEY GENERAL OF MINNESOTA,
PETITIONER

v.

CELLCO PARTNERSHIP, DBA VERIZON
WIRELESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Section 332(c)(3)(A) of the Communications Act of 1934, 47 U.S.C. 332(c)(3)(A), which denies States "any authority to regulate * * * the rates charged" by a commercial mobile radio service carrier, preempts a Minnesota statute that prohibits a carrier from increasing a customer's rates unless the carrier provides the customer written notice 60 days before the effective date of the proposed increase and obtains the customer's consent to the increase.

2. Whether, under Minnesota law, the provisions of the Minnesota statute preempted by Section 332(c)(3)(A) are severable from the remaining portions of the statute.

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In the Supreme Court of the United States

No. 05-1159

MIKE HATCH, ATTORNEY GENERAL OF MINNESOTA,
PETITIONER

v.

CELLCO PARTNERSHIP, DBA VERIZON
WIRELESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Communications Act of 1934 (Communications Act or Act), 47 U.S.C. 151 *et seq.*, provides a federal framework for the regulation of wireless telephone services. Title III of the Act gives the Federal Communications Commission (FCC or Commission) exclusive authority to license the radio frequencies used in wireless communications. 47 U.S.C. 301, 303. In the exercise of that authority, the Commission has, since the mid-1970s, set aside and licensed radio frequencies for wireless telephone service. See *Connecticut Dep't of Pub.*

Util. Control v. *FCC*, 78 F.3d 842, 845 (2d Cir. 1996); *Cellnet Commc'ns, Inc.* v. *FCC*, 149 F.3d 429, 432 (6th Cir. 1998).

Until 1993, wireless communications common carrier services, such as cellular telephone service, were subject to the same system of dual federal and state regulation that applies to traditional wireline telephone services. See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 360 (1986). Under that system, the *interstate* rates of common carriers were subject to Title II of the Act, which requires carriers to file tariffs with the Commission establishing the rates, terms, and conditions of interstate service. 47 U.S.C. 203. *Intrastate* common carrier rates, however, were subject to state regulation, pursuant to Section 2(b) of the Act, 47 U.S.C. 152(b).

In 1993, Congress amended the Act "to dramatically revise the regulation of the wireless telecommunications industry." *Cellnet Commc'ns*, 149 F.3d at 433. The amendments created two regulatory categories of wireless service—commercial mobile radio service (CMRS) and private mobile radio service (PMRS).[1] The amendments also changed the framework of wireless service regulation in two significant respects.

First, Congress eliminated dual federal and state regulation and established instead a uniform "Federal regulatory framework to govern the offering of all" wireless telephone services. H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 490 (1993); see *Connecticut Dep't of Pub. Util. Control*, 10 F.C.C.R. 7025, 7034 (¶ 14) (1995) (Congress wanted a "*national* regulatory policy for CMRS, not a policy that is

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[1] CMRS includes any mobile service "that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. 332(d)(1). PMRS is a wireless communications service that is not CMRS or its functional equivalent. 47 U.S.C. 332(d)(3). The Act uses the terms "commercial mobile service" and "private mobile service." FCC rules substitute the equivalent terms CMRS and PMRS, which we use in this brief.

balkanized state-by-state"). To that end, 47 U.S.C. 332(c)(3)(A) generally denies the States "any authority" to "regulate the entry of or the rates charged by" CMRS or PMRS providers. 47 U.S.C. 332(c)(3)(A); see *Public Util. Comm'n of Haw.*, 10 F.C.C.R. 7872, 7874 (¶ 8) (1995) (*Haw. PUC*). A State may petition the FCC for permission to regulate CMRS rates, and the FCC shall grant permission if the State demonstrates that "market conditions * * * fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." 47 U.S.C. 332(c)(3)(A)(i). Absent FCC authorization, however, Section 332(c)(3)(A) permits States to regulate only "terms and conditions" of CMRS "other" than rates and entry. 47 U.S.C. 332(c)(3)(A).[2]

Second, Congress amended the Act to reflect a "general preference in favor of reliance on market forces rather than regulation." *New York State Pub. Serv. Comm'n*, 10 F.C.C.R. 8187, 8190 (¶ 18) (1995). Congress limited CMRS regulation to situations "for which the Commission and the states could demonstrate a clear-cut need." *Haw. PUC*, 10 F.C.C.R. at 7874 (¶ 10). Thus, although CMRS providers are subject to Title II of the Act, the FCC is authorized to forbear from regulating them if certain criteria are satisfied. 47 U.S.C. 332(c)(1)(A).

The FCC has exercised that forbearance authority to exempt CMRS carriers from filing interstate tariffs. 47 C.F.R. 20.15(c); *Implementation of Sections 3(n) & 332 of the Communications Act*, 9 F.C.C.R. 1411, 1480 (¶ 179) (1994) (*Second Report & Order*). In addition, the FCC has consistently denied States permission to regulate CMRS rates and entry because States have failed to demonstrate that market forces are inadequate to protect customers. See, *e.g.*, *Connecticut*

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[2] In conformity with Section 332(c)(3)(A), Congress amended Section 2(b) of the Act to exclude intrastate CMRS rates and entry from state jurisdiction. 47 U.S.C. 152(b).

Dep't of Pub. Util. Control, 78 F.3d at 848; *Haw. PUC*, *supra*; *Public Util. Comm'n of Ohio*, 10 F.C.C.R. 7842 (1995); *California & Pub. Utils. Comm'n*, 10 F.C.C.R. 7486 (1995) (*Cal. PUC*).

The rates that CMRS providers charge their customers are thus generally governed "by the mechanisms of a competitive marketplace," in which terms of service are established by contract rather than by regulation. *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17,021, 17,032 (¶ 20) (2000). The largely deregulated environment has enabled competition to flourish, with substantial benefits to consumers. Rates are generally affordable, and there has been a proliferation of innovative pricing, such as family and prepaid plans. *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 20 F.C.C.R. 15,908, 15,911-15,912 (¶¶ 3-5), 15,964-15,966 (¶¶ 154-158) (2005). As a result, the number of subscribers has risen steadily and rapidly, and usage per subscriber has consistently increased. *Id.* at 15,912 (¶ 5), 15,970 (¶ 168).

2. On May 29, 2004, Minnesota enacted the Wireless Consumer Protection Act, Art. 5, Minn. Stat. § 325F.695 (Supp. 2006). Article 5 limits the ability of a CMRS carrier to implement a "substantive change" to a customer service contract. A "substantive change" is a contract modification "that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract." Art. 5, subd. 1(d).[3]

Subdivision 3 of Article 5 requires a CMRS provider to "notify the customer in writing of any proposed substantive change * * * 60 days before the change is proposed to take effect." Art. 5, subd. 3. Even after the 60-day waiting period, the change cannot go into effect unless "the customer opts in

[3] A price increase that is attributable entirely to an increase in a tax or fee that the government requires the CMRS carrier to impose on the customer is not a "substantive change." Art. 5, subd. 1(d).

to the change by affirmatively accepting the change prior to the proposed effective date." *Ibid.* If the customer does not consent, "the original contract terms shall apply." *Ibid.*[4] Article 5 "expires August 1, 2007." Art. 5, subd. 5.

3. In 2004, a group of CMRS carriers filed suit in the United States District Court for the District of Minnesota seeking to enjoin enforcement of Article 5. As relevant here, the carriers contended that Subdivision 3 of Article 5 "regulate[s] * * * the rates charged" by CMRS providers and is therefore preempted by Section 332(c)(3)(A) of the Communications Act. 47 U.S.C. 332(c)(3)(A).

The district court entered a temporary restraining order enjoining enforcement of Article 5. Pet. App. 33a-44a. The court ruled that the CMRS providers had shown "an initial likelihood of success on the merits" of their claim that Article 5 is state rate regulation proscribed by Section 332(c)(3)(A). *Id.* at 41a. The court explained that Article 5 is "clearly aimed, in part, at rates," and it cannot be saved from preemption as "a 'generally applicable' consumer protection law" because "it is directed only at providers of cellular services." *Id.* at 39a-40a.

After additional briefing, however, the district court dissolved the temporary restraining order and denied in substantial part the preliminary injunction requested by the CMRS carriers. Pet. App. 16a-32a. Although the court reiterated

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[4] Subdivision 4 of Article 5 provides that a CMRS carrier, upon receiving a proposed customer-initiated change in a contract, "must clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change." Art. 5, subd. 4. The customer's proposed change does not become effective unless the carrier agrees to the change and the customer agrees to any resulting changes in the contract. *Ibid.* Article 5 also requires a CMRS provider (1) to supply each customer, within 15 days of the date on which the service contract is entered, a written copy of the contract or, if requested by the customer, an electronic copy and (2) to "maintain verification that the customer accepted the terms of the contract for the duration of the contract period." Art. 5, subd. 2.

that Article 5 "certainly implicates rates" and "is directed at wireless providers," the court stated that it was "no longer convinced that the law presents impermissible rate regulation." *Id.* at 24a-25a. Instead, the court concluded, Article 5 "manifests basic principles of contract law" by requiring CMRS carriers "to disclose rates, to obtain consent to rate increases, and to honor contractual obligations." *Id.* at 25a.

4. The United States Court of Appeals for the Eighth Circuit reversed. Pet. App. 1a-15a. After examining the text, purpose, and history of Section 332(c)(3)(A), as well as prior interpretations of the provision by the FCC, the court held that Section 332(c)(3)(A) preempts Article 5.

The court "agree[d] with the FCC" that "fixing rates" of CMRS providers is rate regulation proscribed by Section 332(c)(3)(A). Pet. App. 9a (quoting *Pittencrief Commc'ns, Inc.*, 13 F.C.C.R. 1735, 1745 (¶ 20) (1997), review denied *sub nom. Cellular Telecomms. Indus. Ass'n* v. *FCC*, 168 F.3d 1332 (D.C. Cir. 1999)). The court concluded that Subdivision 3 of Article 5 fixes rates because it "requires providers to maintain rates different from those that would be charged if the providers were left to follow the terms of their existing contracts." *Id.* at 10a. The court explained that those contracts typically allow providers to adjust rates after reasonable notice of fewer than 60 days if the customer does not opt out of the adjustment. *Ibid.* Subdivision 3, however, freezes rates for at least the statutory 60-day notice period, and the rate freeze continues for the remainder of the contract term unless the customer opts in to the proposed rate increase. *Id.* at 9a-10a.

The court of appeals rejected the State's argument that Subdivision 3 permits a CMRS carrier to put a proposed rate increase into effect immediately upon the customer's affirmative assent. Pet. App. 9a-10a. The court found the State's interpretation to be "inconsistent with the plain meaning of the text of the statute." *Id.* at 9a. The court explained that Subdivision 3 requires CMRS wireless carriers to notify cus-

tomers of "any proposed substantive change . . . 60 days before the change is proposed to take effect." *Id.* at 9a (quoting Art. 5, subd. 3). The statutory language, the court observed, does not contemplate a modification in the effective date if the customer consents to the rate increase. *Ibid.*

Even under the State's interpretation, the court of appeals concluded, Subdivision 3 "indisputably freezes rates for *some* period." Pet. App. 10a. For customers who do not consent to the increase, the rate freeze continues for the remainder of the contract, "often one or two years." *Ibid.* And, for other customers, the freeze continues until the customer manifests acceptance of the proposed increase. *Ibid.*

The court of appeals also rejected the State's contention that Subdivision 3 is not preempted by Section 332(c)(3)(A) because it is a "consumer protection measure." Pet. App. 10a. The court noted that "[a]ny measure that benefits consumers, including legislation that restricts rate increases, can be said in some sense to serve as a 'consumer protection measure.'" *Id.* at 10a-11a. Therefore, the court reasoned, "a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by § 332(c)(3)(A)." *Id.* at 11a. The court held that consumer protection measures "that directly impact the rates charged by [CMRS] providers," such as Subdivision 3, do not escape preemption. *Ibid.*

The court also rejected the argument that Subdivision 3 is a "neutral application of state contractual or consumer fraud laws" of the kind that the Commission has determined not to be preempted by Section 332(c)(3)(A). Pet. App. 11a (citation omitted). The court explained that Subdivision 3 "goes beyond traditional requirements of contract law" because it "effectively voids" the "opt-out" provisions in existing CMRS contracts and mandates use of a different consent mechanism. *Ibid.* The court noted that "opt-out" provisions generally are legal and binding under Minnesota law. *Id.* at 11a-12a. The

court therefore concluded that Article 5 is preempted by Section 332(c)(3)(A) because it "has a clear and direct effect on" and thus "effectively regulates rates." *Id.* at 12a.

Finally, applying Minnesota law, the court found that the preempted portion of Article 5 cannot be severed from the remainder of the statute. Pet. App. 12a-15a. The court explained that Article 5 was enacted as "a unified effort to regulate certain practices of wireless telecommunications service providers," and the other subdivisions are "dependent upon" Subdivision 3. *Id.* at 13a. The court of appeals therefore remanded the case to the district court for entry of a permanent injunction against enforcement of Article 5. *Id.* at 15a.

DISCUSSION

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court. Nor does the decision below present an important issue of federal law that should be decided by this Court. This Court's review is therefore not warranted.

A. The Decision Of The Court Of Appeals Is Correct

1. The court of appeals correctly held that Section 332(c)(3)(A) preempts Article 5's requirement that CMRS providers provide advance notice of, and obtain customer consent for, any rate increases. Unless a State has obtained authorization from the FCC—which Minnesota has not done—Section 332(c)(3)(A) denies the State "any authority to regulate * * * the rates charged by any" CMRS carrier. 47 U.S.C. 332(c)(3)(A). A state statute like Article 5 that freezes rates at their current level under existing contracts amounts to direct regulation of rates in contravention of Section 332(c)(3)(A).

As the court of appeals observed (Pet. App. 9a), state legislation that "fixes" the rates of CMRS carriers is a form of rate regulation and is thus preempted by Section 332(c)(3)(A). Since the "dawn of modern utility regulation," laws that "fix

the prices a utility could charge" have been considered to be rate regulation. *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 477 (2002). Rate regulation has long been understood to include both governmental rate prescriptions, *e.g.*, *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 385-388 (1932), and limitations on rate increases, *e.g.*, *Mobil Oil Exploration & Producing S.E., Inc.* v. *United Distrib. Cos.*, 498 U.S. 211, 221-226 (1991); *Permian Basin Area Rate Cases*, 390 U.S. 747, 774-784 (1968). The court of appeals' construction of the phrase "regulate * * * the rates charged by" to include the fixing of charges or limitations on the ability to change rates thus accords with the traditional understanding of rate regulation.

The court's reading of Section 332(c)(3)(A) also accords with interpretations of that provision by the FCC. In adjudications under the Act, the FCC "has found the 'rates charged by' language to prohibit states from prescribing, setting, or fixing rates of CMRS providers." *Pittencrief Commc'ns, Inc.*, 13 F.C.C.R. at 1745 (¶ 20); *see, e.g.*, *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. at 17,035 (¶ 25) (Section 332(c)(3)(A) prohibits States from "set[ting] a prospective price for CMRS service"); *Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19,898, 19,907 (¶ 20) (1999) (States "may not prescribe how much may be charged for [CMRS] services"). Because the FCC has been delegated authority to administer the Communications Act, 47 U.S.C. 151, 154(i), its reasonable interpretations of the Act in rulemakings and adjudications are entitled to deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984); see, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005); *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 387 (1999). The court of ap-

peals correctly adhered to the FCC's interpretations of Section 332(c)(3)(A) here.[5]

The court of appeals also correctly concluded that Subdivision 3 of Article 5 "fixes rates" by imposing a rate freeze on every CMRS contract governed by Minnesota law. Pet. App. 9a-10a. As the court explained, Subdivision 3 establishes the existing contract rate as the state-mandated ceiling for at least 60 days, thereby forcing carriers to maintain rates different from those they would charge if they were permitted to invoke the terms in their contracts authorizing mid-term rate changes. In addition, Subdivision 3 also prohibits carriers from increasing rates for the life of the contract unless the customer expressly consents within the 60-day period. *Ibid.*

Petitioner contends (Pet. 27-28) that the court of appeals misread Minnesota law and that Subdivision 3 permits rate increases to take effect before the 60-day period expires if the customer consents before that time. As the court observed (Pet. App. 9a), however, petitioner's reading of Subdivision 3 finds no support in its language, which requires notice "60 days before the change is proposed to take effect" and does not authorize any subsequent alteration in the effective date. Art. 5, subd. 3. Moreover, even under petitioner's reading, Subdivision 3 fixes rates. The statute freezes rates for the remainder of the contract term for every customer who does not consent to the rate increase, and it freezes rates for all customers until they consent.

As the court of appeals noted, the FCC has ruled that a state-imposed delay in the effective date of rate increases

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[5] The courts of appeals have consistently held that the Commission's construction of Section 332(c)(3)(A) is entitled to *Chevron* deference. See, *e.g.*, *National Ass'n of State Util. Consumer Advocates* v. *FCC*, 457 F.3d 1238, 1253 (11th Cir. 2006); *Fedor* v. *Cingular Wireless Corp.*, 355 F.3d 1069, 1073 (7th Cir. 2004); *Sprint Spectrum, L.P.* v. *State Corp. Comm'n.*, 149 F.3d 1058, 1061 (10th Cir. 1998).

constitutes "rate regulation" under Section 332(c)(3)(A). Pet. App. 7a (citing *Haw. PUC*, 10 F.C.C.R. at 7882 (¶ 46) (concluding that Hawaii was regulating rates because its review procedures caused 30-day delays in "most rate or service offerings")). That interpretation of Section 332(c)(3)(A) by the FCC, like the broader view that statutes fixing rates involve rate regulation, see pp. 9-10, *supra*, is a reasonable construction of the Act and is entitled to deference.

Government-imposed price freezes are a common mechanism for regulating rates. See, *e.g.*, *California ex rel. Lockyer* v. *FERC*, 329 F.3d 700, 704 (9th Cir. 2003); *Michigan Bell Tel. Co.* v. *Engler*, 257 F.3d 587, 591 (6th Cir. 2001); *California Power Exch. Corp.* v. *FERC*, 245 F.3d 1110, 1115 (9th Cir. 2001); *Norwood* v. *FERC*, 217 F.3d 24, 26 (1st Cir. 2000), cert. denied, 532 U.S. 993 (2001). And construing a state-imposed rate freeze to constitute rate regulation prohibited by Section 332(c)(3)(A) furthers the purposes of the Communications Act. A rate freeze undercuts the federal free-market approach to CMRS oversight and the related policy of eliminating tariff requirements, which is designed to allow carriers to respond quickly to competitors' price changes without a required waiting period. *Second Report & Order*, 9 F.C.C.R. at 1479 (¶ 177). State-based rate restrictions also threaten to balkanize the framework for CMRS rate regulation, contrary to Congress's desire for a uniform, federal regulatory scheme that reflects the increasingly nationwide character of the wireless industry.

2. Petitioner argues that the Minnesota statute "does not involve any state oversight of wireless rates" and is therefore not state rate regulation prohibited by Section 332(c)(3)(A). Pet. 25. That is incorrect. The statute effectively establishes a maximum lawful rate for at least a 60-day period for all CMRS contracts and for the life of the contract in the absence of consent. That statutory price freeze is essentially equivalent to a prescription by the State of a maximum charge. See

AT&T Co. v. *FCC*, 487 F.2d 865, 875 (2d Cir. 1973) (FCC rule prohibiting carrier from changing rates without prior permission from the FCC is a prescription of existing rates). A state-imposed maximum charge certainly constitutes state "oversight" of rates.

Petitioner also contends that, before the adoption of Section 332(c)(3)(A) in 1993, state rate regulation was "commonly accomplished by government agency oversight of rates" in the form of tariff requirements and review for reasonableness. Pet. 25. According to petitioner, therefore, Section 332(c)(3)(A) must be construed to prohibit only the same type of rate regulation that was common before its enactment. That argument is wrong both historically and legally. As an historical matter, rate regulation before 1993 was not limited to government review of the reasonableness of filed tariffs. For example, some States did not require wireless carriers to file tariffs but instead regulated rates through the use of their complaint authority. See, *e.g.*, *Petition of the State of Ohio*, 10 F.C.C.R. 12,427, 12,429 (¶ 5) (1995). Other States permitted carriers to file tariffs establishing a range of rates and gave carriers broad leeway to change rates within the range. See, *e.g.*, *New York State Pub. Serv. Comm'n*, 10 F.C.C.R. at 8196 (¶¶ 40-42); *Cal. PUC*, 10 F.C.C.R. at 7508-7509 (¶¶ 45-46).

In any event, preemption under Section 332(c)(3)(A) is not limited to traditional forms of rate regulation. Section 332(c)(3)(A) broadly preempts "any" state regulation of rates (47 U.S.C. 332(c)(3)(A)), and there is no indication that Congress intended that the statutory term "any" must be given a narrow construction. Rather, the term supports the FCC's conclusion that Congress sought to proscribe all types of regulation of CMRS rates, not just regulation accomplished through the forms that were common when Section 332(c)(3)(A) was enacted. See *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131 (2002) (explaining that "the

word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'") (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)).

Petitioner also errs in contending that the Minnesota statute is exempt from preemption because, as "a consumer protection measure," it necessarily "falls within the 'other terms and conditions'" that Congress authorized States to regulate. Pet. 27 (quoting Section 332(c)(3)(A)). As the court of appeals explained (Pet. App. 10a-11a), virtually all rate regulation can be characterized as a form of "consumer protection." But Congress clearly did not intend the States to be able to accomplish under the "consumer protection" label what it prohibited them from accomplishing by "rate regulation." Thus, when state laws have "a clear and direct effect on rates," they constitute prohibited rate regulation without regard to whether they might also be characterized as consumer protection legislation. Pet. App. 12a.

Petitioner is likewise mistaken in arguing that the court of appeals "failed to follow this Court's established preemption standards" by "completely ignor[ing] the * * * presumption against preemption." Pet. 21. As this Court has recognized, the "'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000); see *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). There has long been a "significant federal presence" in the regulation of wireless communication services. To be sure, until 1993 the States retained regulatory authority over rates for intrastate wireless service. But the 1993 amendments expressly repealed that authority and extended the significant federal presence. See pp. 1-2, *supra*. Accordingly, the "'assumption' of nonpreemption" has no application here.

In any case, as petitioner concedes (Pet. 21), the court of appeals expressly endorsed the standards that petitioner con-

tends the court failed to follow. See Pet. App. 5a (stating that the court "presume[d] that Congress does not intend preemption of historic police powers of the States 'unless that was [its] clear and manifest purpose'" (quoting *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996)). Thus, petitioner's real contention is that the court of appeals failed to apply that standard correctly. That contention is incorrect and does not, in any event, warrant this Court's review. See Sup. Ct. R. 10(c) (misapplication of settled law is generally not grounds for granting certiorari).

Petitioner also erroneously contends (Pet. 22-24) that the court of appeals held that state laws requiring customer consent to an extension in the length of a wireless contract are preempted by Section 332(c)(3)(A). The court announced no such holding. Instead, it based its preemption ruling solely on the ground that Subdivision 3 of Article 5 prevents or delays *rate increases* and thus directly regulates rates. See Pet. 9a-12a. The court expressed no view on whether the 60-day notice and consent requirement for *contract-term extensions* itself constituted impermissible rate regulation—an issue that the parties addressed only in passing and the FCC declined to address at all. See Resp. C.A. Br. 31 & n.14; Pet. C.A. Br. 40; Resp. C.A. Reply Br. 10 n.7; FCC Amicus Br. 2 n.1. There was no need for the court to address that issue, given its holdings that Article 5's provisions preventing or delaying rate increases were preempted and that other provisions of Article 5 were not severable. Although the court did not expressly address the severability of Article 5's restrictions on contract extension, that omission is hardly surprising, because the parties themselves did not address that specific issue in their appellate briefs. Moreover, it seems clear that the court would not have found those provisions severable in light of its general severability holding, which does not warrant this Court's review for reasons described below. See p. 19, *infra*.

B. The Decision Of The Court Of Appeals Does Not Conflict With The Decision Of Any Other Court

As petitioner forthrightly concedes, "[t]his case presents the first time" that a court of appeals has ruled on whether a statute like Minnesota's is preempted by Section 332(c)(3)(A). Pet. 7. Because "no other circuit court has decided the novel questions presented here" (Pet. Reply Br. 2 n.1), the decision below does not conflict with the decision of any other court of appeals. Indeed, there is no conflict with the decision of any other court.

Petitioner asserts that the "analysis" of the decision below "conflicts in principle" with the Seventh Circuit's decision in *Fedor* v. *Cingular Wireless Corp.*, 355 F.3d 1069 (2004). Pet. Reply Br. 2 n.1. This Court's review would not be warranted even if petitioner were correct, because the Court resolves actual conflicts in results, not analytic conflicts in principle. See *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) (noting that Court "reviews judgments, not statements in opinions"). But there is no conflict, even in analysis. In *Fedor*, the Seventh Circuit held that Section 332(c)(3)(A) did not preempt claims that a wireless carrier violated state law by improperly billing its customers in one month for minutes that they had incurred in another month. 355 F.3d at 1070-1071, 1075. The court reasoned that the "claims address[ed] not the rates themselves, but the conduct of [the carrier] in failing to adhere to those rates." *Id.* at 1074. That reasoning has no relevance here because, unlike the claims in *Fedor*, Subdivision 3 of Article 5 directly regulates the permissibility and timing of rate increases. Petitioner asserts that, in reaching its holding, the Seventh Circuit also reasoned that "laws of general applicability that do not require a court to assess the reasonableness of rates charged" are not preempted. Pet. Reply Br. 2-3 n.1. That reasoning too has no relevance to this case, because the court below determined that Article 5 is not a law of

general applicability. See Pet. App. 11a (noting that the "statute effectively voids the terms of contracts currently used by providers in one industry"). Moreover, although the Seventh Circuit noted that the plaintiff in *Fedor* was not asking the court to review the reasonableness of the rates charged, see 355 F.3d at 1074, the Seventh Circuit did not state that preemption can occur only in that circumstance.

Petitioner also errs in asserting (Pet. Supp. Br. 1-4) that there is an "apparent split" or "conflict in principle" between the decision below and *National Ass'n of State Util. Consumer Advocates* v. *FCC*, 457 F.3d 1238 (11th Cir. 2006). In that case, the Eleventh Circuit held that the FCC exceeded its authority in construing Section 332(c)(3)(A) to preempt state laws that require or prohibit the use of line items in billing by cellular wireless carriers. *Id.* at 1242. The court reasoned that the prohibition or requirement of a line item is not rate regulation because "it does not affect the amount that a user is charged for service" but only "affects the presentation of the charge on the user's bill." *Id.* at 1254. Here, in contrast, the Eighth Circuit found that Article 5 does "affect the amount that a user is charged for service," because it prevents CMRS providers from implementing otherwise permissible rate increases without first giving 60 days notice and obtaining consumer consent. As the court of appeals explained, Article 5 thus "has a clear and direct effect on rates." Pet. App. 12a. Accordingly, the decision is entirely consistent with the Eleventh Circuit's holding that line-item requirements and prohibitions are not preempted. Indeed, the Eleventh Circuit quoted with approval the FCC's statement that Section 332(c)(3)(A) prohibits States from "fixing rates of [wireless service] providers." 457 F.3d at 1256 (citations omitted). The court of appeals in this case quoted and applied that very same principle in concluding that Minnesota's statute is preempted because it "fixes the rates" that providers may charge. Pet. App. 9a. There is no conflict.

C. This Case Does Not Present An Important Question Of Federal Law That Warrants This Court's Review

1. Petitioner contends that the decision in this case "has immensely important, far-reaching implications for the sovereign rights of the fifty States and their 184 million wireless customers." Pet. 7. That is incorrect. No other State has enacted a statute that freezes CMRS rates, and the Minnesota statute expires by its own terms on August 1, 2007. Art. 5, subd. 5. Although petitioner asserts (Pet. Reply Br. 7) that the Minnesota Legislature could extend the statute, no legislation of that kind is presently pending. The decision below therefore has limited importance even in Minnesota, much less broad importance throughout the 50 States.

Contrary to petitioner's contention (Pet. 8, 9-11), the court of appeals' decision does not prevent the States from prohibiting unfair business practices by wireless providers. The decision holds only that a state law is preempted if it "freezes" the rates that CMRS providers may charge and thus "has a clear and direct effect on rates." Pet. App. 9a, 12a. Under the court's decision, state laws that are targeted at CMRS providers and that "directly impact" CMRS rates are preempted even if the State labels them consumer protection laws, *id.* at 11a, but the decision in no way calls into question the power of the States to enact generally applicable laws prohibiting unfair business practices, or other laws that do not directly affect wireless rates.

Petitioner is also incorrect in asserting (Pet. 8, 12) that the court of appeals' decision bars States from enacting laws of general applicability that require notice and consent to changes in contract terms. On the contrary, the decision suggests that laws of general applicability, such as "neutral * * * state contractual or consumer fraud laws," may be exempt from preemption even if they have an effect on CMRS rates. Pet. App. 11a. The court cited with apparent approval

rulings by the FCC that "state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332" because those laws have only "indirect and uncertain effects" on rates and "fall no more heavily on CMRS providers than on any other business." *Id.* at 8a (quoting *Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. at 19,908 (¶ 23), and *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. at 17,034-17,035 (¶ 24)). The court correctly concluded, however, that Article 5 is not such a law. Pet. App. 11a-12a.

Petitioner further errs in arguing (Pet. 14-20; Pet. Supp. Br. 3-6) that the decision below calls into question the authority of the States to enact consumer protection or other laws specific to the wireless industry. As discussed above, the only laws that would be preempted under the reasoning of the court of appeals are those that "fix[] [CMRS] rates" or have a "clear and direct effect on [CMRS] rates." Pet. App. 9a, 12a. Other laws, even those targeted at the wireless industry, are unaffected by the rule of law applied below. Petitioner's prediction (Pet. 14) that the decision below "could be interpreted" to prohibit all state consumer protection laws targeting CMRS is both conjectural and improbable. It presumes that courts interpreting the decision will ignore the test actually used by the court of appeals to decide the preemptive reach of Section 332(c)(3)(A), which requires a showing that the challenged regulation "directly impact[s] the rates charged by providers." Pet. App. 11a.[6]

[6] Petitioner asserts (Pet. 17-18) that the decision below jeopardizes the validity of a variety of existing wireless-specific statutes. Many of the statutes petitioner identifies, however, do not involve rate or entry regulation and are therefore not affected by the court of appeals' decision. For example, there is no reason to believe that the court (or the FCC) would conclude that Section 332(c)(3)(A) applies to state statutes that prohibit a CMRS provider from including the telephone number of a customer in a directory or telephone database without that customer's consent, mandate acknowledgment of any minimum term in a CMRS contract, subject CMRS providers to telephone-

Petitioner's contention that the court's decision calls into question state consumer protection legislation "targeted at landline communication carriers" is also incorrect. Pet. Reply Br. 4. The preemptive reach of Section 332(c)(3)(A) is limited to state laws that regulate the entry and rates of wireless providers. Nothing in the court's decision suggests that the court interpreted Section 332(c)(3)(A) to preempt state legislation governing landline services.[7]

2. Finally, petitioner argues that the court of appeals, by enjoining Article 5 in its entirety, misapplied Minnesota's law on severability. That issue also does not warrant further review. This Court does not sit to review claims of error in the interpretation of state law. *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989). Furthermore, petitioner does not contend that the court of appeals failed to state correctly the Minnesota law of severability, and this Court does not generally grant review "when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10(c).

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number conservation measures, or require the disclosure of contract terms. *Ibid.* Indeed, the FCC has expressly stated that state laws governing the disclosure of CMRS rates are not preempted. See *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. at 17,026 (¶ 8); *Southwestern Bell Mobile Sys.*, 14 F.C.C.R. at 19,908 (¶ 23). Nothing in the court of appeals' decision undercuts that administrative determination.

[7] The only case cited by petitioner in support of his claim that the decision below affects state laws governing landline services, *OCMC, Inc.* v. *Norris*, 428 F. Supp. 2d 930 (S. D. Iowa 2006), actually supports the contrary proposition. The district court in *OCMC* expressed the view that the state laws governing landline services at issue in that case were *not* preempted, and the court noted that the decision in this case "was based on the language of 47 U.S.C. § 332(c)(3)(A), which explicitly preempts the states from regulating the rates that *cellular* telephone companies may charge." *Id.* at 940 (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
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MIKE HATCH, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF MINNESOTA
AND NOT AS AN INDIVIDUAL,
Petitioner,

v.

CELLCO PARTNERSHIP
D/B/A VERIZON WIRELESS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICI CURIAE* OF AARP, CONSUMERS UNION, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL ASSOCIATION OF STATE PIRGS, NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, and NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PETITIONER

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Telecomweb, "Consumers Union Intensifies Pressure on Wireless Service Providers" (Jan. 20, 2004), *available at* http://www.telecomweb.com/news/1073596741.htm. 10

Truth-in-Billing and Billing Format, NASUCA Petition for Declaratory Ruling Regarding Truth-in-Billing, FCC 05-55 (Second Report and Order and Declaratory Ruling), (March 18, 2005) 19

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Wireless Competition Bureau, Federal Communications Commission, Ninth Annual CMRS Report, Appendix A, Table 1 (Sept. 2004) ("9th CMRS Rept.") 7

No. 05-1159

IN THE
Supreme Court of the United States

MIKE HATCH, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF MINNESOTA
AND NOT AS AN INDIVIDUAL,
Petitioner,

v.

CELLCO PARTNERSHIP
D/B/A VERIZON WIRELESS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICI CURIAE* OF AARP, CONSUMERS UNION, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL ASSOCIATION OF STATE PIRGS, NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, and NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE[1]

[1] No counsel for any party authored any portion of this brief. No persons other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. Amici has filed with the clerk letters of consent from Petitioner and Respondents for the filing of this brief.

AARP is a nonprofit, nonpartisan organization with more than 36 million members representing the interests of Americans aged 50 and older. In response to the growing number of older wireless subscribers, who frequently use their cell phones primarily for security purposes, AARP advocates for rules and legislation to promote informed choice and consumer protection in the wireless telecommunications market.

Consumers Union is a nonprofit membership organization dedicated to providing consumers with information, education and counsel about goods, services, health and personal finance. Consumers Union's Consumer Reports regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare.

The National Association of Consumer Advocates ("NACA") is a non-profit group of attorneys and advocates committed to promoting consumer justice and curbing abusive business practices that bias the marketplace to the detriment of consumers. NACA's membership includes over 1,000 law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates across the country.

The National Association of State Public Interest Research Groups ("U.S. PIRG") serves as the national advocacy office for state PIRGs. The state PIRGs are non-profit, non-partisan public interest advocacy organizations with over 500,000 members. State PIRGs, and U.S. PIRG

advocate for, among other things, improved telecommunications services.

The National Association of State Utility Consumer Advocates ("NASUCA") is a voluntary, national association of 45 consumer advocates in 42 states and the District of Columbia. NASUCA's membership includes state agencies that represent the interests of utility consumers before state and federal regulators and in the courts, independent advocacy organizations, and divisions of State Attorneys General offices.

The National Consumer Law Center, Inc. ("NCLC") is a non-profit corporation engaged in research, education and litigation regarding matters that affect low-income consumers. NCLC's efforts focus on the prices and practices of regulated utilities, including telephone, electricity, and natural gas companies. NCLC intervenes in various proceedings before state and federal utility regulatory agencies.

SUMMARY OF ARGUMENT

The Court should grant *certiorari* because the Eighth Circuit has decided an important federal question involving the degree to which 47 U.S.C. § 332(c)(3)(A) of the Federal Communications Act of 1934, as amended ("FCA"), preempts state regulation of commercial mobile radio service ("CMRS" or "wireless"). Whether state laws, like Minnesota's "Consumer Protections for Wireless Customers" statute, Minn. Stat. § 325F.695 (2004) ("Minnesota Act"), regulate "rates charged by" wireless service and are therefore preempted under section 332(c)(3)(A) of the FCA, or whether such laws regulate "other terms and conditions of" wireless service over which state jurisdiction is preserved, not only

affects the 185 million Americans who currently subscribe to some form of wireless service, but every state whose laws conceivably could be affected by the Eighth Circuit's decision.

The Minnesota Act does not regulate wireless carriers' rates and therefore is not preempted under section 332(c)(3)(A) of the FCA. The Minnesota Act is a consumer protection law. It requires all wireless carriers to: (1) give consumers adequate notice prior to a proposed substantive change in their contracts, and (2) obtain consumers' affirmative consent to the change before modifying those contracts. The Minnesota Act is a legitimate, reasonable, and necessary exercise of Minnesota's police power that regulates the terms or conditions of wireless service.

The wireless industry has experienced astounding growth since 1993. Approximately 185 million Americans – more than sixty percent of the nation's population – were subscribed to wireless telephone service by December 2004. The wireless industry's robust growth, however, has been accompanied by widespread unfair, misleading and deceptive business practices that adversely affect consumers. Such practices harm consumers financially and deprive them of the information and choices they should have in a competitive marketplace. As a result, States have been forced to take a more active role in protecting consumers from the wireless industry's unfair practices, especially since the Federal Communications Commission ("FCC") does little more than compile the number of complaints it receives.

State laws or regulations enacted in response to unreasonable wireless practices, such as the Minnesota Act, are precisely the sorts of state consumer protection laws that Congress intended to preserve when it amended section

332(c)(3) of the FCA. By giving an unlawfully broad construction to what constitutes regulation of "rates charged by" CMRS, while giving an impermissibly narrow construction of "other terms and conditions" of CMRS reserved to State regulation, the Eighth Circuit ignored the purpose of the FCA and disregarded the principles of federalism.

Moreover, the notion that Congress intended to narrowly limit States' authority to regulate "other terms and conditions" of CMRS to "generally applicable" contractual or consumer fraud laws finds no support in the 1993 amendments to section 332. Congress' chief intent was to remove States from decisions relating to the licensing of CMRS providers and thereby promote the rapid deployment of wireless facilities and infrastructure. To the extent Congress may have expressed a general preference that competition should determine wireless rates, that preference is hardly synonymous with preempting States from prohibiting and deterring consumer abuses unrelated to the setting of rates. More significantly, to the extent Congress sought to foster the growth and development of the nation's wireless telecommunications infrastructure through its 1993 amendments to section 332(c)(3)(A), that goal has been achieved. The wireless industry is mature and needs no additional dispensations.

Significantly, the wireless industry is not only seeking to strike State wireless consumer laws, but has argued to other courts and the FCC that the decision below is precedent for invalidating consumer claims under general state contractual and consumer protection laws. Thus, the wireless industry's argument, if successful, will effectively grant the wireless industry a license to operate above the law.

For the foregoing reasons, *amici* urge the Court to grant Petitioner Hatch's Petition for a *Writ of Certiorari* and reverse the decision below.

ARGUMENT

The Court should grant *certiorari* because the Eighth Circuit[2] has decided an important federal question that has not been, but should be, settled by the Court. This question involves the degree to which section 332(c)(3)(A) of the Federal Communications Act of 1934, as amended ("FCA"),[3] preempts state regulation of commercial mobile radio service ("CMRS" or "wireless").

Certiorari should also be granted because the Eighth Circuit's decision conflicts with relevant decisions of the Court. While the Eighth Circuit observed that its interpretation of the scope of the express preemption clause in section 332(c)(3)(A) "must rest primarily on a fair understanding of congressional purpose," and presumes that Congress does not intend preemption of historic police powers of the States "unless that was [its] clear and manifest

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[2] *Cellco P'ship v. Hatch*, 431 F.3d 1077 (8th Cir. 2005).

[3] 47 U.S.C. § 332(c)(3)(A) currently states, in part:

> No State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

purpose,"[4] its review of section 332(c)(3)(A) failed to comport with these principles.

The Minnesota Act does not regulate wireless carriers' rates and is a legitimate, reasonable, and necessary exercise of Minnesota's police power to protect Minnesota consumers by regulating the terms or conditions of wireless service. The Minnesota Act is a consumer protection law. It requires all wireless carriers to: (1) give consumers adequate notice prior to a proposed substantive change in their contracts, and (2) obtain consumers' affirmative consent to the change before modifying those contracts. The Minnesota Act does not set, fix or prescribe any particular rate or charge. Nor does it directly affect wireless carriers' rates. The Minnesota Act merely prevents carriers from unfairly modifying customers' contractual obligations without notice or consent. Moreover, to enforce the Minnesota Act, a court would not consider the carrier's rate or make any determination about its reasonableness.

I. THE EIGHTH CIRCUIT'S DECISION HARMS MILLIONS OF CONSUMERS NATIONWIDE

A. The Need for State Wireless Consumer Protection Laws Has Grown With the Wireless Industry.

Since 1993, the wireless industry has expanded one-hundred and forty fold, from thirteen million to nearly 185 million customers. *See* Wireless Competition Bureau, Federal

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[4] *Cellco*, 431 F.3d at 1080, *citing Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996).

Communications Commission, Ninth Annual CMRS Report, Appendix A, Table 1 (Sept. 2004) ("9th CMRS Rept."). In 2006, CTIA, the Cellular Telecommunications & Internet Association, reported that wireless subscribership grew over fourteen percent from 2004 to 2005, making that year the "Highest Growth Year Ever: Up More than 25.7 Million [subscribers] from December 2004." *See* CTIA, Semi-Annual Wireless Industry Survey, "Year-End 2005 Estimated Wireless Subscribers" (2006), *available at* http://files.ctia.org/img/survey/2005_endyear/slides/EndYear_4.jpg. The wireless industry, moreover, consistently experienced double digit subscriber growth in each year since 2000. *Id.* As Petitioner Hatch noted, by the FCC's count, more than sixty percent of the nation's population subscribed to wireless telephone service by December 2004. Pet. 2.

Not only are more Americans subscribing to wireless service today than ever before, they are also steadily increasing their wireless usage. Americans no longer use their wireless phones simply to talk; they are also text messaging and using data services such as web searching, sending photographs, and downloading songs, games, and information from the Internet in record numbers. *See* CTIA, "Subscriber Growth Breaks Record... Again," Press Release (April 6, 2006), *available at* http://www.ctia.org/news_media/press/body.cfm?record_id=1600. As a result, wireless usage has increased exponentially since 1993. Between 1998 and 2003, wireless service usage quintupled from 143 to 813 average monthly minutes per subscriber. Matthew J. Kleinman, *Crossed Signals In a Wireless World: The Seventh Circuit's Misapplication of the Complete Preemption Doctrine*, 2004 Duke L & Tech. Rev. 14 (2004). In 2005 alone, carriers reported a sharp 35.8% increase in usage to more than 1.4 trillion minutes used - an increase of 400 billion minutes - over 2004. CTIA, Semi-Annual

Wireless Industry Survey, "Reported Wireless Minutes of Use Exceed 1.4 Trillion in 2005" (2006), *available at* http://files.ctia.org/img/survey/2005_endyear/slides/EndYear_6.jpg.

Concurrent with the remarkable growth in wireless subscribers and usage over the past decade, revenues have also risen sharply year after year. In 1993, the wireless industry posted approximately $10.9 billion in revenues, a figure that has grown each year, with 2005 revenues exceeding $113.5 billion. CTIA, Semi-Annual Survey, "CTIA's Semi-Annual Wireless Industry Survey Results: June 1985 - December 2005" (2006), *available at* http://files.ctia.org/img/survey/2005_endyear/slides/EndYear_2.jpg and http://files.ctia.org/img/survey/2005_endyear/slides/EndYear_3.jpg.

B. The Wireless Industry's Growth Has Been Accompanied By Widespread Unfair, Misleading and Deceptive Business Practices.

The wireless industry's growth has been accompanied by widespread unfair, misleading and deceptive business practices. Such practices harm consumers financially and deprive them of the information and choices they should have in a competitive marketplace.

Recent data compiled by the Better Business Bureau ("BBB") indicate that the wireless industry was the single most-complained about industry in 2004, and again in 2005, surpassing even car dealers in customer dissatisfaction.[5] The

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[5] Better Business Bureau, "Better Business Bureaus Provide Close to 90 Million Instances of Service in 2005," Press

BBB found most complaints fit into three categories: billing, quality of customer service, and misrepresentations or miscommunications by sales or customer service personnel. Likewise, *Amicus* Consumers Union, found that consumers wanted to see changes in the way wireless providers do business.[6] Similarly, J.D. Power and Associates recently found that one-third of wireless users contact their carrier with quality-related concerns, while forty-two percent of inquiries regarded billing issues, one-half of which are due to incorrect charges.[7]

Amicus AARP's recent surveys have likewise found that consumers are dissatisfied with wireless service.[8]

Release (March 8, 2006), *available at* http://www.bbb.org/alerts/article.asp?ID=663. *See also* Better Business Bureau, "Better Business Bureau Analysis of Cell Phone Complaints Reveals Root Causes of Customer Dissatisfaction," Press Release (May 4, 2004), *available at* http://www.bbb.org/alerts/article.asp?ID=511.

[6] Telecomweb, "Consumers Union Intensifies Pressure on Wireless Service Providers" (Jan. 20, 2004), *available at* http://www.telecomweb.com/news/1073596741.htm.

[7] J.D. Power and Associates, 2006 Wireless Customer Care Performance Study - Volume 1, Press Release (Jan. 25, 2006), *available at* http://www.jdpa.com/studies_jdpower/pressrelease3.asp?ID=2006016.

[8] *See* Baker & McLarty-Jackson, "Understanding Consumer Use of Wireless Telephone Service, Findings from an AARP Survey," AARP Public Policy Institute (Dec. 2000) ("2000 Wireless Survey"), *available at* http://assets.aarp.org/rgcenter/consume/d17328_wireless.pdf; *see also* Baker &

Eighty-four percent of frequent wireless users reported trouble making or receiving a call and, in one survey, almost ninety percent of respondents found their wireless phone difficult to operate. AARP found that "as more people come to rely on their cell phones as their primary phone and with older persons' reliance on wireless communications as a safety device, providing consumer protection to this industry has become a significant consumer issue."[9] In a recent survey of New York residents, AARP found that consumers overwhelmingly support state government action addressing widespread problems in the wireless market.[10]

Wireless complaints also constitute a significant percentage of all telecommunications complaints received by the FCC. The FCC's Consumer and Government Affairs Bureau's ("CGB") reports indicate an increase in complaints in recent years. The total number of wireless telecommunications complaints received by the CGB have nearly doubled over the past four years from 14,147 in 2002, to 25,942 in 2005 – exceeding even the rate of wireless subscriber growth over this time. Wireless telecommunications complaints, as a percentage of total telecommunications complaints, ranged from a low of 25.8%

Kim-Sun, "Understanding Consumer Concerns About the Quality of Wireless Telephone Service," AARP Public Policy Institute (June 2003) ("2003 Wireless Survey"), *available at* http://assets.aarp.org/rgcenter/consume/dd89_wireless.pdf.

[9] Dinger, "The Need for Wireless Telephone Consumer Protections: A Survey of New York Residents," AARP Knowledge Management, at 6 (June 2004), *available at* http://assets.aarp.org/rgcenter/consume/ny_wireless.pdf.

[10] Id. at 3-4.

in 2005, to a high of 32.6% in 2004, during this time period.[11]

State Commissions also receive a substantial number of wireless customer complaints. In 2004 the California Public Utility Commission ("CPUC") fined Cingular Wireless $12.4 million and ordered restitution that could amount to another $20 million for violating the State's consumer protection laws.[12] The CPUC noted that it had received over 1,000 complaints from Cingular customers, and that more than 144,000 customers had complained to the company.[13]

The CPUC's complaint figures illustrate that far fewer consumers complain to state or federal agencies than to the utility itself. According to AARP's nationwide survey of wireless customers, nearly half did not know who to contact if a carrier does not resolve a billing or service problem.

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[11] FCC, CGB Quarterly Inquiries and Complaints Reports, *available at* http://www.fcc.gov/cgb/quarter/welcome.html.

[12] Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Pacific Bell Wireless LLC dba Cingular Wireless, U-3060, U-4135, and U-4314, to Determine Whether Cingular Has Violated the Laws, Rules and Regulations of this State in Its Sale of Cellular Telephone Equipment and Service and its Collection of an Early Termination Fee and Other Penalties From Consumers, 2004 Cal. PUC LEXIS 453 (2004) (appeal pending *Pacific Bell Wireless, LLC dba Cingular Wireless v. Pub. Utilities Comm.*, Cal Ct. App., 4th App. Div. 3 (2005); *see also* CPUC Ann. Rep., July 1, 2003 - June 30, 2004, at 27).

[13] CPUC Ann. Rep., July 1, 2002 - June 30, 2003, at 23.

AARP 2003 Wireless Telephone Service at 4.

C. States Must Protect Wireless Consumers Because the FCC Does Not.

States have needed to take action to protect consumers from unfair or unreasonable business practices in the wireless industry because the FCC has not. The FCC does little more than prepare reports of complaints it receives. The FCC's quarterly consumer complaint reports, provide no carrier-specific information to enable States, or consumers, to identify how many complaints and inquiries are made against each CMRS provider. Similarly, the reports do not indicate what types of complaints and inquiries are made against each CMRS provider. Nor do the reports indicate the outcome of the consumers' complaints to the agency.

Despite having received nearly 83,000 wireless complaints since January 2002, the FCC has not issued a single fine or taken a single enforcement action against a CMRS in response to consumers' complaints. This is apparently consistent with the FCC's treatment of telecommunications consumers in general according Commissioner Michael J. Copps, who noted:

> From quarter to quarter, we receive more consumer complaints on telephone billing than on any other issue, with the one exception of indecency. What are we doing about it? Not much—and nothing recently.[14]

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[14] Remarks of Commissioner Michael J. Copps, "An Always-On Campaign for Consumers," Consumer Assembly 2004 – The Continuing Communications Revolution: The Need for

For wireless consumers, Commissioner Copps noted, the situation was even worse. Indeed, the only action the FCC appears willing to take in response to problems with wireless carriers' business practices, is action preempting States from addressing such problems.[15]

II. CONGRESS DID NOT IMMUNIZE WIRELESS CARRIERS FROM INDUSTRY-SPECIFIC STATE CONSUMER PROTECTION LAWS.

A. The Eighth Circuit's Decision Undermines Principles of Federalism.

The Eighth Circuit's finding that the Minnesota Act is preempted by section 332(c)(3)(A) effectively immunizes wireless carriers from industry-specific State contractual and consumer protection laws.

Clearly, section 332(c)(3)(A) contains only an "express" intent to preempt states from regulating wireless carriers' entry and the rates charged by CMRS. There is no implied preemption beyond the FCA's expressed language. Moreover, any suggestion that broader preemption is appropriate is squarely contradicted by the many savings

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Consumer Protection, at 4 (March 11, 2004); available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244855A2.pdf.

[15] *See, e.g., In re Truth-in-Billing and Billing Format,* Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 F.C.C.R. 6448, 6462-63 ¶30 (2005); *id.* at 6473-76 ¶¶49-54; *see also id.* at 6498-6501 (separate statements, approving in part, dissenting in part, of Commissioners Michael J. Copps and Jonathan S. Adelstein).

clauses contained in the FCA that recognize and preserve State authority over telecommunications-related matters.[16]

1. Congress Clearly Preserved State Laws Like Minnesota's Act.

State laws enacted in response to the wireless industry's unfair and deceptive business practices, such as the Minnesota Act, are precisely the sorts of consumer protection laws that Congress intended to preserve when it amended section 332(c)(3) of the FCA. Section 332(c)(3)(A), which contains the preemption language at the heart of the proceedings below, was added to the FCA in 1993. *See* Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 394 (1993). The Eighth Circuit failed to consider the 1993 amendments, and the legislative history of those amendments, in their entirety. Taken as a whole, the 1993 amendments and their legislative history show that Congress clearly did not intend to preempt laws such as the Minnesota Act.

The Eighth Circuit failed to give proper consideration to the statutory structure created by Congress in the 1993 amendments to section 332. These amendments made a

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[16] Generally, three situations exist in which federal law may preempt state law: (1) where a federal statute *expressly* contains language prohibiting or limiting state authority; (2) where a federal statute contains comprehensive language implying that federal law occupies the *field* of regulation; and (3) where state law is in direct *conflict* with a federal regulation. *La. Pub. Serv. Comm. v. FCC*, 476 U.S. 355, 368-69 (1986); *Cipollone v. Liggett Group*, 505 U.S. 504 (1992); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, (1982).

number of changes to the FCA regarding States' regulation of wireless carriers. First, the 1993 amendments introduced a distinction between commercial wireless and private mobile service. Next, Congress narrowed the prior scope of preemption that had prohibited States from "imposing any rate or entry regulation upon any private land mobile land service" by extending that preemption to CMRS but narrowing the preemption of rates to "rate charges" and allowing States to regulate wireless rates charged in certain circumstances. Finally, the 1993 amendments *added* a savings clause expressly preserving state regulatory authority over "other terms and conditions" of CMRS. 47 U.S.C. § 332(c)(3).[17]

The court below focused entirely on the first clause of section 332(c)(3)(A), ignoring the latter provisions of section 332(c)(3), which make clear that the scope of preemption of States' authority over CMRS rates is narrow. These latter provisions of section 332(c)(3) indicate that Congress did not intend to preclude States from having regulatory oversight over the wireless industry, even to the extent of resuming regulatory oversight of wireless rates. For example, the second clause of section 332(c)(3)(A) provides:

> Nothing in this subparagraph shall exempt

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[17] The Eighth Circuit noted that when section 332(c)(3) was added to the Act in 1982, it preempted some aspects of state wireless regulation. As originally enacted, section 332(c)(3) provided that "no State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service." 431 F.3d at 1080, *quoting* 47 U.S.C. § 332(c)(3) (1992).

> [CMRS] ... from requirements imposed by a State commission ... necessary to ensure the universal availability of telecommunications service at affordable rates.

47 U.S.C. § 332(c)(3)(A). This clause "allows a state to promote universal service by regulating rates if wireless services are a substitute for a substantial portion of the communications within the state." *CTIA v. FCC*, 168 F.3d 1332, 1335 (D.C. Cir. 1999).

Similarly, the Eighth Circuit ignored the third clause of section 332(c)(3)(A), and section 332(c)(3)(B). These provisions allow States, subject to FCC approval, to regulate CMRS "rates" if market conditions fail to protect consumers from unjust and unreasonable CMRS rates or unjustly or unreasonably discriminatory CMRS rates. *See* 47 U.S.C. §§332(c)(3)(A)(i) - (ii) & (B). Thus, not only did Congress expressly authorize States to enact laws, like the Minnesota Act, Congress also authorized States to enact laws regulating CMRS rates under certain circumstances.

The Eighth Circuit also ignored Congress' goal in amending section 332(c)(3).[18] Before 1993, States were prohibited from regulating the rates or entry of private land mobile services but fully regulated other wireless carriers to the extent they were "common carriers." The 1993 amendments were intended to ensure that States had greater authority over new, commercial wireless services than they would have had if those services had been classified as private mobile services. More importantly, the Budget Committee report made it clear that preserving States' authority to protect wireless consumers was a *primary*

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[18] 431 F.3d at 1080.

concern of Congress in amending the FCA.

Likewise, the Eighth Circuit failed to consider the other savings clauses in the FCA. For example, section 414 of the FCA provides:

> Nothing in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.[19]

The court's narrow reading of section 332(c)(3)(A)'s reservation of jurisdiction to States renders the general savings clause in section 414 of the Act superfluous.

Finally, Congress' chief intent when amending the FCA was to remove States from decisions relating to the licensing of CMRS providers and thereby promote the rapid deployment of wireless facilities and infrastructure. Significantly, to the extent Congress sought to foster the growth and development of the nation's wireless telecommunications infrastructure through its 1993 amendments to section 332(c)(3)(A), that goal has been achieved. The wireless industry is mature and needs no additional dispensations.

2. The Wireless Industry's Campaign for Immunity From State Contract and Consumer Protection Laws Also Must Be Rejected.

In addition to challenging State wireless specific consumer laws, wireless carriers are uniformly arguing that

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[19] 47 U.S.C. § 414.

any state law, regulation, or lawsuit brought under state contract or consumer protection law affects its rates and is therefore preempted.

For example, CTIA petitioned the FCC for a declaratory ruling that lawsuits challenging wireless carriers' imposition of "early termination fees" as illegal penalties under State consumer protection and contract laws are preempted under the FCA. Petition of the Cellular Telecommunications & Internet Association for an Expedited Declaratory Ruling, WT Docket No. 05-194, Public Notice, DA 05-1389 (May 18, 2005), 70 Fed. Reg. 38928 (July 6, 2005); *see also* Petition of SunCom Wireless Operating Company, LLC for a Declaratory Ruling, WT Docket No. 05-193, Public Notice, DA 05-1390 (May 18, 2005), 70 Fed. Reg. 38926 (July 6, 2005).

The wireless carriers also argued before the FCC that state regulation of misleading and deceptive line item billing charges is preempted. Truth-in-Billing and Billing Format, NASUCA Petition for Declaratory Ruling Regarding Truth-in-Billing, FCC 05-55 (Second Report and Order and Declaratory Ruling), (March 18, 2005). CMRS' efforts, therefore, if successful, will result in a license to operate above the law.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to grant the Petition for a Writ of Certiorari.

May 12, 2006

Respectfully submitted,

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In the Supreme Court of the United States

MIKE HATCH,
Attorney General of Minnesota
Petitioner,

v.

CELLCO PARTNERSHIP,
DBA VERIZON WIRELESS, ET. AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

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INTEREST OF *AMICI CURIAE*

States have a fundamental interest in enacting laws that serve to protect their citizens. The issue presented here is the validity of Minnesota's wireless consumer protection act that ensures its citizens have notice and an opportunity to consent prior to certain changes in their wireless telephone contracts. The purpose of the law is to protect citizens from unconscionable contract provisions. The Minnesota law was enacted, in part, based on testimony provided at a legislative hearing where a citizen testified that the term of his cell phone contract was unilaterally changed from a month-to-month contract to a one-year contract without his knowledge. The Minnesota Legislature enacted the wireless consumer protection act to address these concerns among others.

The inherent right of the State to protect its citizens as Minnesota has done is one of those rights that has never been ceded to the federal government. The 10th Amendment of the Constitution provides that States retain those powers not expressly delegated to the federal government. This principle serves as the bedrock of our federalist system of government.

In addition to enacting the State law based on its inherent rights, Minnesota predicated its enactment of this law based on a clear and manifest intent as expressed by Congress when it set forth the federal–State regulatory scheme for the wireless telephone industry. The Federal Communications Act specifically preserves to the States the right to regulate certain terms and conditions of wireless contracts. Nevertheless, the Court of Appeals overturned the Minnesota statute. The States have a substantial interest in ensuring that their citizens are protected from unconscionable contract provisions and have express Congressional authority to provide protections for wireless telephone consumers. Amici States, therefore, have a substantial interest in this Court granting review.

SUMMARY OF ARGUMENT

The Constitution preserves to the States the authority to enact consumer protection laws as part of their historic police powers. Such laws can provide citizens a redress against unconscionable contract provisions and ensure that they have a bargaining position that prevents contracts of adhesion. States have traditionally exercised rights in this area. Minnesota enacted a law exercising this authority.[1] At public hearings, the Minnesota Legislature heard complaints from citizens regarding unilateral changes in their cell phone contracts.[2] In one example, a month-to-month contract was changed to a one-year contract without notice to the citizen. The contract also instituted an early termination fee if canceled prior to the one year. In an attempt to address problems of this nature, the Legislature enacted a statute that required companies to provide customers with a notice and consent provision for certain key terms of their cell phone contracts.

This is exactly the type of situation that States have traditionally regulated and one that the Constitution protects. The Court of Appeals nevertheless overturned the Minnesota statute.[3] The Court incorrectly found that the Minnesota statute was preempted by federal law. The Court of Appeals should have interpreted the State and federal statutes in a way that gave them *both* effect because there was no clear and manifest intent expressed by Congress to preempt this type of state law. Such an analysis would achieve the harmony between State and federal law that our Founders intended and the Tenth Amendment requires. The Court of Appeals ignored the States' role in enacting consumer protections of this nature and has therefore invaded sovereign State rights protected by the Tenth Amendment.

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[1] Minn. Stat. Ann. § 325F.695 (2006 Supp).

[2] C.A. App. 0333-36.

[3] Pet. App. 1a-15a (431 F.3d. 1077 (8th Cir. 2005)).

When Congress enacted § 332(c)(3)(A)[4] of the Federal Communications Act it expressly reserved to the States authority over certain terms and conditions of cell phone contracts. While Congress prohibited States from regulating "the entry of or the rates charged" for wireless telephone providers, the federal Act specifically preserved to the States the right to regulate the "other terms and conditions" of contracts between providers and consumers.[5]

Not only did Minnesota enact this law pursuant to its traditional and historic State police powers but also pursuant to the express authority preserved to it by Congress. Under the Court of Appeals' interpretation, the rate prohibition language of the federal Act preempted Minnesota's consumer protection efforts.[6] This was incorrect. The Minnesota statute, which required reasonable notice and consent prior to a unilateral change in the terms and conditions of a contract, does not conflict with the federal statute. The Court of Appeals' decision has thwarted the intent of Congress that specifically reserved consumer protection powers to the States and fails to respect the States' inherent and constitutional powers to protect their citizens.

Left untouched, the Court of Appeals' decision undermines these traditional and historic State police powers that are so important to our republic.



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[4] 47 U.S.C. § 332(c)(3)(A).

[5] 47 U.S.C. § 332(c)(3)(A).

[6] Minn. Stat. Ann. § 325F.695 (2006 Supp).

ARGUMENTS FOR GRANTING THE PETITION

A. The Constitution preserves the States' historic police powers.

The Constitution created a federal government of limited powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[7] The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it, "[t]he powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite."[8]

Citing precedent dating back more than 120 years, this Court in *Gregory v. Ashcroft* held[9]:

> "The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' . . . 'Without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White, 74 U.S. 700, 7 Wall. 700, 725, 19 L. Ed.*

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[7] U. S. Const., Am. X.

[8] The Federalist No. 45, p. 292 (James Madison) (Clinton Rossiter Ed., 1961).

[9] *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1992)(Internal citations omitted).

227 (1869), quoting *Lane County v. Oregon, 74 U.S. 71, 7 Wall. 71, 76, 19 L. Ed. 101 (1869).*

This Court has repeatedly acknowledged its overriding respect for States' rights preserved by the 10th Amendment. In *Wisconsin Public Intervenor* the Court set forth the starting point for a preemption analysis when it observed, "[w]hen considering pre-emption, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[10]

B. States must be vigilant in protecting consumers against unconscionable contracts.

Imagine entering into a month-to-month cell phone contract and subsequently calling to cancel it because you found another provider that better met your needs. You were told that your contract had been extended into a one-year contract. You were advised that the only way you could cancel would be to pay a $150 early termination fee. And, to make matters worse, if you did not pay the early termination fee, the matter would be referred to a collection bureau and become part of your permanent credit history. This is exactly the situation that the Minnesota Legislature has tried to address.

Without any means of redress, wireless telephone companies can routinely trap consumers into contracts using old fashioned "bait and switch" tactics. They could set incredibly low rates that have unlimited usage only to switch such terms and conditions at a later time, imposing the early termination fees as well. This is a situation that calls for State oversight.

Misuse of bargaining power leads to unconscionable contracts and States must be able to legislate against such matters.[11]

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[10] *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[11] See e.g. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

Consumer protection law is a field traditionally regulated by the States.[12] Indeed, all fifty States and the District of Columbia have enacted consumer protection statutes designed to protect consumers from unfair, deceptive, and abusive business practices in the marketplace.[13]

Though the right of citizens to contract is well established, this right is not absolute. Fundamental with the private right to contract is the public right to regulate in the common interest to prevent one party from exercising its freedom of contract to work the public harm.

The Minnesota Legislature enacted the consumer protections for wireless customers act in 2004.[14] Minnesota's right to enact laws that protect its consumers is well established. The controversy that this case presents is whether the notice and consent provisions of the State statute are a regulation of the "rates charged" by cell phone providers and therefore preempted by federal law. As fully explained in Minnesota's petition, the Minnesota Legislature enacted the law to regulate contracts, not rates. As the District recognized below, this is plainly evident from an examination of the law itself[15]:

> [The Minnesota law] manifests basic principles of contract law. Nothing in the law prevents wireless providers from charging any rate the market will bear. Nothing in the law caps wireless rates. Similarly, the law does not dictates [sic] whether a particular billing method is unreasonable. *Cf.* *In re Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19898, 1999 WL 1062835, at P 23 (F.C.C. November 18, 1999) (FCC finding that lawsuits challenging the practice of billing in whole minute

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[12] See e.g. *General Motors Corp. v. Abrams*, 897 F.2d 34 (2d Cir. 1990).

[13] National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, Section 1.1, (6th Ed. 2004).

[14] Minn. Stat. Ann. § 325F.695 (2006 Supp).

[15] Pet. App. at 25a (2004 U.S. Dist. LEXIS 18464, 12-13 (D. Minn. 2004)).

> increments constituted such rate regulation). Instead, the law requires notice and informed consent to contract changes. As the FCC has observed, state law claims relating to the "disclosure of rates and rate practices are not generally preempted under Section 332." 14 F.C.C.R. 19898 at P 23. [The Minnesota law] requires wireless providers to disclose rates, to obtain consent to rate increases, and to honor contractual obligations. [The Minnesota law] also prohibits changes to established contracts absent informed consent to those changes.

No industry should, in the name of freedom to contract, be allowed to eviscerate the rights of the people to enact laws that extend such basic protections.

These consumer protection statutes are exactly the kind of "historic police powers of the States" that were recognized in *Florida Lime & Avocado Growers v. Paul.*[16]

The requisite review to determine if any given contract complies with State law is generally a factual matter properly left to the States. The Court of Appeals' decision, if allowed to stand, will invade the province of the States to determine whether certain contract provisions are unconscionable. The Court of Appeals' decision wholly ignores the important role that consumer protection statutes play in preventing and deterring unfair practices in the marketplace.

The necessity to preserve States' rights in contractual matters is further evidenced when one observes the long history of voiding contracts of adhesion.

Black's Law Dictionary defines an "adhesion contract" as[17]:

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[16] *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 144-146 (1963).

[17] Black's Law Dictionary (5th Ed. 1979).

> Standardized contract form offered to consumers of goods and services on essentially [a] "take it or leave it" basis without affording [the] consumer realistic opportunity to bargain and under such conditions that [the] consumer cannot obtain desired product or services except by acquiescing in form contract. [A] distinctive feature of adhesion contract is that [the] weaker party has no realistic choice as to its terms.

States are well within their constitutionally protected rights to enact laws that provide consumer protection against unconscionable provisions in cell phone contracts. The two parties are in unequal bargaining positions as evidenced, in part, by the fact that the contracts are offered on a "take it or leave it" basis. Because States need to protect their citizens against unilateral and unconscionable contract amendments, it is important for this Court to review the Court of Appeals' decision.

C. The Minnesota statute furthers the goals and policies of the federal Act.

Congress expressly permitted the States to regulate the terms and conditions of cell phone contracts. The Act and its legislative history set forth a relatively decentralized scheme that preserves a broad role for State regulation. The Act states, "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."[18]

The legislative history makes this even more clear, as stated in the House Report[19]:

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[18] 47 U.S.C. § 332(c)(3)(A).

[19] H.R. Rep. No. 103-111, 103rd Cong. 1st Sess. (1993), *reprinted in* 1993 U.S. Code Cong. & Admin. News, 378, 588 (emphasis added).

> Section 332(c)(3) provides that state or local governments cannot impose rate or entry regulation on private land mobile service or commercial mobile services; this paragraph further stipulates that nothing here shall preclude a state from regulating the other terms and conditions of commercial mobile services. *It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services.* By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and *other consumer protection matters* . . . or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

The Minnesota statute states, in part[20]:

> A provider must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. . . . If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

The Minnesota statute is an example of exactly the type of oversight that Congress intended for the States to maintain. The Court of Appeals, however, overturned the Minnesota statute, in part, because it concluded that the 60-day notice provision impacted rates.

The Court in *Cellular Telecomm's Indus. Ass'n. v. FCC*,[21] rejected similar arguments in its decision upholding a Texas

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[20] Minn. Stat. Ann. § 325F.695(3) (2006 Supp).

[21] *Cellular Telecomm's Indus. Ass'n. v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999).

statute requiring providers to make contributions to a state fund, by stating, in part[22]:

> Here the idea is that the Texas contribution requirements are impermissible rate regulation because they increase the wireless service provider's costs of doing business in the state and thus impact the rates charged to customers. One might say the same about local siting laws or state consumer protection laws. They too increase the cost of doing business. Yet a House Committee cited these laws as examples of the variety of *permissible* regulation of the "other terms and conditions." The Commission offered other such examples, including some drawn from its previous decisions. To equate state action that may increase the cost of doing business with rate regulation would, the Commission reasonably concluded, forbid nearly all forms of state regulation, a result at odds with the "other terms and conditions" portion of the first sentence.

The Court of Appeals in the present case should have applied the same analysis. The potential impact a statute might have on rates should not invalidate the State statute. The ability to regulate unilateral changes to contracts is exactly the type of consumer protection measure that Congress intended for the States to regulate irrespective of an indirect affect on rates, revenues or costs.[23]

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[22] *Cellular Telecomm,* 168 F.3d at 1336 (internal citation omitted).

[23] *Cellular Telecomm,* 168 F.3d 1332.

D. Federal preemption law respects historic State police powers.

The long history of federal preemption law is reflected in Justice Thomas's concurrence in *Bates v. Dow Agrosciences LLC*[24]:

> Today's decision thus comports with this Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption. This reluctance reflects that pre-emption analysis is not "[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," but an inquiry into whether the ordinary meanings of state and federal law conflict.

The Court of Appeals acknowledged[25] that it was bound by this Court's decision in *Medtronic, Inc. v. Lohr*[26] and that the scope of an express preemption clause "must rest primarily on 'a fair understanding of *congressional purpose*.'"[27] Quoting *Medtronic,* the Court went on to acknowledge that it must be presumed that Congress did not intend preemption of historic police powers of the States "unless that was [its] clear and manifest purpose."[28] While correctly citing the relevant inquiry, the Court did not apply this analysis to the Minnesota statute. The Court reasoned that because a 60-day notice *might* delay a rate change, it was therefore tantamount to rate regulation and must be preempted. That is where the Court erred. The federal Act does not provide a "clear and manifest" preemption of the Minnesota statute.

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[24] *Bates v. Dow Agrosciences, LLC,* 544 U.S. 431; 125 S. Ct. 1788, 1807; (2005) (internal citations omitted) (Thomas, J., concurring in the judgment in part and dissenting in part).

[25] Pet. App. at 5a (431 F.3d at 1080).

[26] *Medtronic, Inc. v. Lohr,* 518 U.S. 470 (1996).

[27] *Medtronic,* 518 U.S. at 485–486.

[28] Pet. App. at 5a (431 F.3d at 1080).

To the contrary, the federal Act preserves to the States these traditional consumer protections. The Court's inquiry should be limited to the relevant statutory provisions and legislative history, not a circuitous rationale. The Court went to some length rationalizing the impact such a notice and consent provision might have on rates. Such an inquiry was incorrect. The Court should have looked at the federal statute and its legislative history and stopped there. If there was any doubt as to the Congressional intent (amici does not think there was) then the Court must uphold the state statute. Instead the Court went further in its analysis to fashion a finding of implied preemption. The Court applied the wrong analysis.

This Court has enunciated the proper review in such a case many times. This limited scope of review was recently confirmed by this Court in *Bates v. Dow*[29]:

> [W]e would nevertheless have a duty to accept the reading that disfavors pre-emption. "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention "'clear and manifest.'"

The Court of Appeals' inquiry should have been limited to whether Congress clearly and manifestly intended to preempt laws such as the Minnesota statute.[30] The goals and policies of the federal Act include permitting States to regulate the "terms and conditions" of cell phone contracts. The enforcement of the Minnesota statute would give the State's citizens the protections the Minnesota Legislature thought were needed. The Court of

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[29] *Bates v. Dow*, 544 U.S. 431, ___; 125 S. Ct. at 1801 (internal citation and quotation marks omitted).

[30] *See Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 685 (1996) and *Volt Info. Scis. v. Bd of Trs.*, 489 U.S. 468, 479 (1989).

Appeals' decision denies these citizens these legitimate protections and ignores the clearly expressed state authority that the Congress intended.

E. The Minnesota consumer protection statute is not rate regulation under 47 U.S.C. § 332(c)(3)(A).

The Court of Appeals concluded that subdivision 3 of the Minnesota statute "effectively" regulated the rates of cell phone service and was therefore preempted by § 332(c)(3)(A).

Subdivision 3 of the Minnesota statute states[31]:

> **Provider-initiated substantive change.** A provider must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

Subdivision 1 (d) defines "substantive change" as follows[32]:

> "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract. "Substantive change" includes a modification in the provider's administration of an existing contract term or condition. A price increase that

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[31] Minn. Stat. Ann. § 325F.695(3) (2006 Supp).

[32] Minn. Stat. Ann. § 325F.695(1)(d) (2006 Supp).

> includes only the actual amount of any increase in taxes or fees, which the government requires the provider to impose upon the customer, is not a substantive change for purposes of this section.

The Court of Appeals concluded that the State statute may *affect* rates, stating[33]:

> A waiting period on any proposed rate changes, whether it be for 60 days or some shorter period pending a customer's decision to "opt-in," has a clear and direct effect on rates. We thus conclude that subdivision 3 effectively regulates rates, and is preempted by § 332(c)(3)(A).

The Court erred in its conclusion. The federal statute, 47 U.S.C. § 332(c)(3)(A), does not say that any state law that *affects* rates is preempted. It only preempts a regulation of "rates charged."[34] Minnesota does not set cell phone rates. It does not review them. It simply provides consumers with an opportunity to assent to increases proposed by the provider prior to their taking effect, otherwise the original terms of the contract apply. The Minnesota statute is a fundamental consumer protection assuring that consumers get the deal they bargained for.[35]

The overly broad meaning given by the Court of Appeals to "rates charged" in § 332 contrasts with many Federal Communications Commission (FCC) and court decisions construing the same language. The Court of Appeals refers to several FCC decisions in analyzing the tension between the rate regulation prohibition and the States' consumer protection authority of the states.

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[33] Pet. App. at 12a (431 F.3d at 1083).

[34] 47 U.S.C. § 332(c)(3)(A).

[35] It should be noted that Minn. Stat. Ann. § 325F.695 (1)(d) also governs changes in the length of the contract term.

The Court of Appeals relied on *In Pet. of Hawaii Pub Util Comm'n*,[36] for the proposition that even a 30-day review was "rate regulation."[37] The Minnesota statute is distinguishable from the Hawaii case in that there is no *review* of the rates taking place by the State of Minnesota. It is the consumer that is given the opportunity to review the proposed change under the Minnesota law, not State government. Furthermore, the *Hawaii* proceeding was a petition under § 332(c)(3)(B) of the federal Act, which permits States to retain their rate regulatory authority as specifically provided by that subsection. It was not a case deciding whether § 332(c)(3)(A) preempted Hawaii law. Contrary to the Court of Appeals' broad application of the inopposite FCC ruling the agency's statement concluded[38]:

> Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is present by the HPUC Petition and related comments. Thus, we will *not* expound at any length on this matter.

The FCC went on to say[39]:

> Complaint proceedings may concern carrier practices, separate and apart from their rates. In consequence, it is conceivable that matters might arise under state complaint procedures that relate to "customer billing information and practices and billing disputes and other consumer matters." We view the statutory "other terms and conditions" language as sufficiently flexible to permit Hawaii to continue to conduct proceedings on complaints

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[36] *In Pet. of Hawaii Pub Util Comm'n*, 10 F.C.C.R. 7872 (1995)(emphasis added).

[37] Pet. App. at 7a (431 F.3d at 1080-1081).

[38] *In Pet. of Hawaii*, 10 F.C.C.R. at 7883 (¶ 55) (emphasis added).

[39] *In Pet. of Hawaii*, 10 F.C.C.R. at 7883 (¶ 56).

> concerning such matters, to the extent that state law provides for such proceedings.

The above language acknowledges that even the FCC recognized that § 332(c)(3)(A)'s "other terms and conditions" language allows for state consumer protections laws. The language of the federal Act requires the broad reading of "other terms and conditions" intended by Congress, not the narrow reading given by the Court of Appeals.

Such a finding was also supported in *In the Matter of Southwestern Bell Mobile Systems, Inc.*[40] In that case, the FCC determined that the wireless industry was not exempt from the application of state contract and consumer fraud laws even if they related to the disclosure of rates and rate practices. *Southwestern Bell* rejected the notion that all claims that may be related to rates are necessarily preempted by the Act[41]:

> [T]he legislative history of Section 332 clarifies that billing information, practices and disputes – all of which might be regulated by state contract or consumer fraud laws – fall within "other terms and conditions" which states are allowed to regulate. Thus, state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332.

In yet another case, the FCC rejected the claim that various state consumer, contract and tort claims were forms of impermissible rate regulation in its decision *In the Matter of Wireless Consumers Alliance*, the agency said[42]:

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[40] *In the Matter of Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R. 19898 (1999).

[41] *In the Matter of Southwestern Bell*, 14 F.C.C.R. at 19908 (¶ 23).

[42] *In the Matter of Wireless Consumers Alliance*, 15 F.C.C.R. 17021, 17035–17036 (2000) (¶ 27).

> In short, we reject arguments by CMRS carriers that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for the service. A carrier may charge whatever price it wishes and provide the level of service it wishes, as long as it does not misrepresent either the price or the quality of service. Conversely, a carrier that is charging a "reasonable rate" for its services may still be subject to damages for a non-disclosure or false advertising claim under applicable state law if it misrepresents what those rates are or how they will apply, or if it fails to inform consumers of other material terms, conditions, or limitations on the service it is providing. We thus do not agree with those commenters who allege that, for consumer protection claims, any damage award or damage calculation, including any refund or rebate, is necessarily a ruling on the reasonableness of the price or the functional equivalent of a retroactive rate adjustment.

The Court of Appeals' incorrect construction of § 332's prohibition of the regulation of "rates charged" also differs from the approach taken by other courts. In *Brown v. Washington/Baltimore Cellular, Inc.*,[43] the court found that state regulation of late fees was not preempted by § 332(c)(3)(A). The court said[44]:

> For example, a claim of false advertising could lead to an increased obligation to notify customers of charges, which could in turn lead to an increase in rates. Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves.

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[43] *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F. Supp.2d 421 (D. Md. 2000).

[44] *Brown*, 109 F. Supp.2d at 423.

The Court of Appeals below concluded that if a State's law provisions "affect" rates it must be preempted under § 332(c)(3)A). This is contrary to what the Court in *Brown* said, "Congress did not preempt all claims that would *influence* rates."[45] The Court in *Brown* accurately reflects the plain language of the federal Act as well as its legislative history. A finding that a State law may *affect* the "rates charged" is not prohibited under the federal Act.

In *Fedor v. Cingular Wireless Corp.*,[46] the court held that a challenge to the billing practice in the way the company billed for minutes used was not preempted by the "rates charged" prohibition of the federal Act. The court stated[47]:

> In other words, these claims address not the rates themselves, but the conduct of [the company] in failing to adhere to those rates. That is precisely the type of state law contract and tort claims that are preserved for the states under *§ 332* as the "terms and conditions" of commercial mobile services.

Finally, in *Iowa v. U.S. Cellular Corp.*,[48] the court in upholding consumer protection claims, noted that "[t]he claims do not attempt to regulate rates, they merely require [company] to fairly and adequately disclose its contract terms to consumers and to refrain from unjust and oppressive business practices."[49]

The cases cited above demonstrate that the Minnesota statute should not be preempted. The State of Minnesota does not regulate rates and does not review rates. The Minnesota statute simply requires providers to give fair and meaningful disclosure

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[45] *Brown*, 109 F. Supp.2d at 423.

[46] *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004).

[47] *Fedor*, 355 F.3d at 1074.

[48] *Iowa v. U.S. Cellular Corp.*, No. 90197 (S.D. Iowa August 7, 2000) (2000 WL33915909).

[49] *Iowa v. U.S. Cellular*, No. 90197, 2000 WL39915909 at 11.

of substantive changes in contracts to its customers. As previously referenced, the District Court said[50]:

> Nothing in the law prevents wireless providers from charging any rate the market will bear. Nothing in the law caps wireless rates. . . . Instead, the law requires notice and informed consent to contract changes.

Section 332(c)(3)(A) of the federal Act does not preempt the Minnesota statute. The federal Act was not intended to supplant State law such as the Minnesota law which does not regulate "rates charged." The Minnesota Legislature has simply done what it was authorized to do under 47 U.S.C. § 332(c)(3)(A).

CONCLUSION

The Court of Appeals' decision casts a far-reaching net over the terms of a cell phone contract. This decision makes it impossible for any State to require fundamental notice and consent prior to unilateral substantive changes to cell phone service contracts. Such statutory authority is reserved to the States by the Constitution unless preempted by a "clear and manifest" intent expressed by Congress. In this instance, Congress was careful to preserve such authority to the States.

The contract notice and consent provisions of the Minnesota statute give the consumer the right to enforce the original terms of the contract. If the consumer does not have this fundamental protection afforded by the Minnesota statute, cell phone providers can increase charges to customers or extend their contract term without notice. This would result in an impermissible imbalance in the contractual relationship and violate 600 years of black letter contract law. Unilateral changes to contracts result in contracts of adhesion. Such contracts are voidable under traditional State consumer protection principles, and nothing in the federal statute

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[50] Pet. App. at 25a (2004 U.S. Dist. LEXIS 18464, 12-13).

undermines that State authority. The Minnesota statute simply allows consumers an opportunity to get what they bargained for.

Congress has not preempted State authority to protect its citizens regarding traditional consumer protections. Congress went to great lengths to preserve these rights of the States and its intention should not be undermined by a preemption claim.

James Madison agonized over "the supposition that the operation of the federal government will *by degrees* prove fatal to the State governments."[51] We submit that this Court should review the case below to assure that the Court of Appeals decision does not erode the State authority that our Founders so carefully cautioned against.

This Court should grant certiorari.

Respectfully submitted,

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[51] The Federalist No. 45, p. 289 (emphasis added).